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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM HOHRI, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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40 pp

QUESTIONS PRESENTED

I. Whether the statute of limitations for plaintiffs' claims was tolled until the early 1980's when evidence of the government's fraud on this Court first became available?

II. Whether "sovereign immunity" bars compensation for intentional government violations of the fundamental constitutional rights of American citizens of Japanese ancestry interned during World War II?

III. Whether Executive Orders 9066 and 9102, and related statutes, regulations, and executive actions interning American citizens of Japanese ancestry during World War II made the government a fiduciary for those persons, for purposes of Tucker Act jurisdiction under *United States v. Mitchell*?

PARTIES TO THE PROCEEDINGS

Petitioners (plaintiffs below) are William Hohri, Hannah Takagi Holmes, Chizuko Omori (individually and as representative for Haruko Omori), Midori Kimura, Merry Omori, John Omori (individually and as representative of Juro Omori), Gladyce Sumida, Kyoshiro Tokunaga, Tom Nakao, Harry Ueno, Edward Tokeshi, Rentaro Hashimoto, Nelson Kitsuse (individually and as representative for Takeshi Kitsuse), Eddie Sato, Sam Ozaki (individually and as representative for Kyujiro Ozaki), Kumao Toda (individually and as representative for Suketaro Toda), Kaz Oshiki, George R. Ikeda, Tim Takayoshi, Cathy Takayoshi, and the National Council for Japanese American Redress.

Plaintiffs requested class certification (an issue not yet determined) for the class of persons defined as follows:

> The approximately 120,000 United States citizens and permanent residents, and representatives of such persons no longer living, who during World War II were subjected to forcible segregation, arrest, exclusion, imprisonment, curfew and travel restrictions, deportation, loss of citizenship, or other deprivations of their civil rights and liberties due to the fact of their Japanese ancestry, pursuant to President Proclamation 2525, Executive Order 9066, Public Laws 503 and 405, Presidential Proclamation 2655, or other actions and orders of the United States, its officers, agents, and employees.

Defendant herein is the United States of America, also referred to as the "government."

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Plaintiffs William Hohri, *et al.*, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit is reported at 847 F.2d 779 (Fed. Cir. 1988). The district court opinion is reported at 586 F. Supp. 769 (D.D.C. 1984).

JURISDICTION

The court of appeals' judgment was entered on May 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 1257(3).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This petition concerns constitutional claims under the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Thirteenth Amendments to the United States Constitution; the Habeas Corpus, Ex Post Facto, Bills of Attainder, and Privileges and Immunities Clauses; and Article III. Pertinent statutes and orders are: the Tucker Act, 28 U.S.C. § 1491; the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*; the All-Writs Act, 28 U.S.C. § 1651; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; the Administrative Procedure Act, 5 U.S.C. § 702; Executive Order 9066, 3 C.F.R 1092 (1942); and Executive Order 9102, 3 C.F.R. 1123 (1942). Relevant portions of these provisions are set out in the Appendix.

STATEMENT OF THE CASE

Plaintiffs are American citizens and permanent residents who were subjected to unprecedented mass racial discrimination by the United States government during World War II, solely on the basis of their Japanese ancestry. Plaintiffs seek monetary and declaratory relief on behalf of themselves and approximately 120,000 Americans similarly situated, for injuries arising from those wartime actions.

Following United States entry into World War II, War Department officials conferred with West Coast politicians and devised a plan of mass exile and detention for all Americans of Japanese ancestry on the west coast. ¶59, Amended Complaint, App.[1] 96-97. Subsequently, on February 14, 1942, the local military

[1] "App." refers to the Appendix filed with this Court.

commander issued a "Final Recommendation" to the President, urging that mass actions be taken against Americans of Japanese ancestry to prevent espionage and sabotage. JA[2]169. The military claimed that individual treatment was not feasible, because the Japanese race was "an enemy race" whose "racial strains are undiluted" despite their United States citizenship, and that loyal citizens assertedly could not be quickly distinguished from the disloyal. JA 169.

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066 (App. 149-50), empowering the Secretary of War to exclude "any or all persons" from any designated areas. Pursuant to that Order and implementing legislation, Pub.L. No. 77-503, 56 Stat. 173 (1942), "exclusion orders" were issued banishing all Americans of Japanese ancestry from the entire state of California, and major portions of Oregon, Washington, and Arizona, and simultaneously ordering them detained indefinitely in racially segregated prison camps. In the camps, plaintiffs were denied virtually every fundamental right protected by the Constitution. Their mass exclusion and imprisonment continued for approximately three years without meaningful individual review, trials, or any pretense of due process.

Numerous contemporaneous legal challenges were raised against these discriminatory actions.[3] Those

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[2] "JA" refers to the Joint Appendix filed with the United States Court of Appeals for the Federal Circuit.

[3] Over fifty contemporaneous legal challenges were brought, including actions for injunctive and declaratory relief, habeas corpus, and constitutional challenges to criminal prosecutions for violations of the government's discriminatory orders. JA 215-219.

challenges were repeatedly denied by this Court and lower federal courts, based on the government's claim of "military necessity." *See Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); and *Yasui v. United States*, 320 U.S. 115 (1943). As a result, Americans of Japanese ancestry have had no judicial redress whatsoever for the government's wrongful actions,[4] and have suffered severe stigma and injury due to this Court's affirmation of the government's wartime policies.

In the early 1980's, archival documents were discovered and later made available for the first time to plaintiffs and the general public, showing that responsible government officials at the time *actually knew* there was no factual justification to the claim of "military necessity" and *knew* the exclusion and detention program was solely the product of racial animus. Exhibits J, K, and L, Amended Complaint, App. 131-43. Those documents further showed that government officials deliberately concealed this crucial evidence from this Court, and intentionally obstructed plaintiffs' contemporaneous access to judicial redress for the government's own wrongful actions.[5] ¶¶ 93-103, Amended Complaint, App. 112-117.

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[4] Limited administrative redress was provided by the 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. §§ 1981 *et seq.*, but that Act was predicated on the government's continuing claim that the wartime actions were based on "military necessity," and did not permit review or redress for the constitutional wrongs, personal injuries, or numerous other injuries inflicted on Americans of Japanese ancestry. *See* S. Rep. No. 1740 (80th Cong., 2d Sess.), *reprinted in* 1948 U.S. Code Cong. & Ad. News 2298-2300; and S. Rep. No. 601 (82d Cong., 1st Sess.), *reprinted in* 1951 U.S. Code Cong. & Ad. News 1694.

[5] Legislation to authorize partial compensation recently passed

Based on this newly discovered evidence, plaintiffs filed suit against the United States in March, 1983. Their Complaint asserts twenty-two claims for compensatory and declaratory relief including claims for violation of: Due Process; Equal Protection; Unjust Taking; Protection from Unreasonable Arrest, Search and Seizure; Privileges and Immunities; Right to Fair Trial and Representation by Counsel; Protection from Cruel and Unusual Punishment; Freedom of Religion; Freedom of Speech and Press; Freedom of Association; Freedom of Petition for Redress of Grievances; Privacy, Travel, and other Constitutional Rights; Protection from Involuntary Servitude; Bills of Attainder and Ex Post Facto Laws; Denial of Habeas Corpus; Conspiracy to Deprive Civil Rights; Assault and Battery; False Arrest and False Imprisonment; Abuse of Process and Malicious Prosecution; Negligence; Contract; and Breach of Fiduciary Duty.

PROCEEDINGS BELOW/PRIOR APPEALS

The government moved to dismiss plaintiffs' Complaint, citing sovereign immunity, statutes of limita-

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both Houses of Congress, and has been reported favorably by a House-Senate Conference Committee (H.R. Rep. No. 100-785, 100th Cong., 2d Sess. (1988)). As of this writing the measure has been approved by both Houses. If signed by the President and fully funded by appropriations over its ten (10) year term, the legislation would authorize payment of $20,000 to individuals of Japanese ancestry living on the date of enactment who were interned, or, if deceased, payment is restricted to their surviving spouse, children, or parents. The conference agreement makes no provision for internees who died prior to enactment, or whose losses exceed $20,000. Acceptance of payment is deemed full satisfaction of all claims against the United States, but the bill does permit eligible individuals to choose pursuing the instant litigation rather than receiving payment under the statute.

tions, and alleged exclusivity of the 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981 *et seq.*, (hereinafter "1948 Claims Act"). Plaintiffs opposed dismissal, asserting (1) the 1948 Claims Act was constitutionally deficient and not the exclusive remedy for plaintiffs' injuries; (2) sovereign immunity does not bar plaintiffs' claims in light of specific constitutional and statutory grants of jurisdiction, and the egregious facts of this case; and (3) plaintiffs' claims were timely because deliberate governmental fraud and concealment tolled the statutes of limitations until the early 1980's, when direct evidence of fraud was uncovered.

The district court, granting dismissal, ruled that the 1948 Claims Act was not the exclusive remedy for plaintiffs' injuries. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984). The district court found waivers of sovereign immunity under the Tucker Act for plaintiffs' contract claim (Count XXI) and Takings Clause claim (Count III), but found no waiver of sovereign immunity for plaintiffs' other constitutional claims (Counts I-II, IV-XV). The district court held the Federal Tort Claims Act was a waiver of sovereign immunity as to plaintiffs' causes of action sounding in tort (Counts XVI-XX), but held they were barred due to plaintiffs' failure to file preliminary administrative claims. The district court further ruled there was no fiduciary relationship between plaintiffs and the government to support Count XXII.

The district court also held that government officials concealed and misrepresented critical intelligence information before this Court during the war. Without any evidentiary hearings, however, the district court held plaintiffs had sufficient notice of that conceal-

ment through isolated post-war scholarly references in the late 1940's and early 1950's. The district court therefore held the statute of limitations was tolled only during that early period, and therefore even plaintiffs' contract and Takings Clause claims were now time-barred.

Plaintiffs first appealed to the United States Court of Appeals for the District of Columbia Circuit, which held plaintiffs' Takings Clause claims were timely, because of fraud and concealment by government officials before this Court, and because of the strong deference due the military commander's judgment and the decisions this Court based thereon, at least until the creation of the Commission on Wartime Relocation and Internment of Civilians ("CWRIC") by Congress in 1980, Pub.L. No. 96-317, 94 Stat. 964. The District of Columbia Circuit affirmed the district court's decision in all other significant respects. *Hohri v. U.S.*, 782 F.2d 227 (D.C. Cir. 1986). The government filed a suggestion for rehearing *en banc*, which was denied. 793 F.2d 304 (D.C. Cir. 1986)

Plaintiffs and the government both sought further review in this Court, which vacated the judgment of the District of Columbia Circuit on jurisdictional grounds and remanded the case with instructions that the appeal be transferred to the Federal Circuit. *Hohri v. U.S.*, 482 U.S. ___, 107 S.Ct. 2246 (1987).

By a two-to-one *per curiam* vote, the United States Court of Appeals for the Federal Circuit adopted the judgment of the district court. *Hohri v. U.S.*, 847 F.2d 779 (Fed. Cir. 1988). Senior Circuit Judge Baldwin vigorously dissented from the panel's ruling on the statute of limitations, stating (847 F.2d at 782):

Appellee's actions during the War clearly constituted fraudulent concealment. The district court found, based on the pleadings and the historical evidence, that appellee did, in fact, conceal critical evidence during the prosecution of *Hirabayashi* and *Korematsu* before the Supreme Court. 586 F. Supp. at 787-88. But the court found that once the Hoover, Fly, and Ringle documents, all objects of concealment, were leaked, the statute had run. *Id.* I disagree that these documents were sufficient to rebut the presumption of military deference provided by the Supreme Court in *Hirabayashi* and *Korematsu*. These documents constituted only a small portion of the information concealed, and by no means the most important information.

REASONS FOR GRANTING THE WRIT

> Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . [but] Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, [and] because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily . . .

Korematsu v. United States, 323 U.S. at 223 (1944).

I. This is an historic case of mass constitutional violations imposed on innocent Americans due solely to racial animus.

During World War II, the United States government forcibly deprived 120,000 loyal American citizens and permanent residents of their most fundamental constitutional freedoms, solely on the basis of their race. These actions were motivated by racial animus, ill will, and wartime hysteria.

The seeds for such mass deprivations were sown long before Pearl Harbor. Federal and state laws had for many years discriminated against Americans of Japanese ancestry, denying them citizenship and the right to purchase property, and relegating them to a second-class existence.[6] When Japanese Imperial forces attacked Pearl Harbor, the effects of discrimination and segregation gave rise to rampant racism, and Americans of Japanese ancestry became a national scapegoat.

Following United States entry into the war, the government carried out a concerted and pre-planned[7]

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[6] *See, e.g.*, 8 U.S.C. § 703, Immigration Act of 1924; that discriminatory naturalization law was not repealed until 1952. *See also*, U.S. Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1983), pp. 27-42.

[7] Several years before the Pearl Harbor attack, plans were made at the highest levels of the government that "concentration camps" should be built for imprisoning Americans of Japanese ancestry (citizens and non-citizens) in the event of "trouble" and in order to "impress the Japanese with the seriousness of our preparations" for war. *See* October 9, 1940, Memorandum from Secretary of Navy Knox to President Roosevelt, (Exhibit A, Amended Complaint, JA 143); and August 10, 1936 Memorandum from President Roosevelt to Chief of Naval Operations (Exhibit B, Amended Complaint, JA 145).

mass exile and imprisonment of all Americans of Japanese ancestry on the West Coast, citizens and residents alike. Over 120,000 men, women, and children were rounded up at gun point. Hospitals, orphanages, and asylums were raided. Plaintiffs were all banished to forsaken prison camps, where they were detained under harsh and dangerous conditions by their own government for periods averaging three years. *See*, ¶¶66-92, Amended Complaint, App. 100-12. These actions were taken without probable cause, filing of criminal charges, or trials. No similar actions were taken against Americans of Italian or German ancestry.[8]

Plaintiffs suffered devastating losses of liberty, dignity, livelihood, property, and life itself. The captives did not know how long they would be imprisoned or whether they would survive the camps. Many did not. Others survived physically but the substance of their lives was destroyed by the government's actions, which deprived them not only of their freedom, but also of their honor. At times they were treated worse than animals—entire families were often housed in

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[8] Government officials also planned to imprison over 100,000 Americans of Japanese ancestry living in Hawaii, where martial law had actually been imposed. This plan was unsuccessful primarily because the large percentage of Americans of Japanese ancestry in the island's population (35%) and their great value as labor made such an effort impracticable. However, over 2,000 Americans of Japanese ancestry were either selectively imprisoned in island camps or deported to mainland prison camps. By contrast, Americans of Japanese descent constituted at most 3% of any West Coast state's population, all of whom were imprisoned. *See*, generally, Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1983), pp. 261-82.

single horse stalls. They were shunned, despised, and blamed for the atrocities of the Japanese Imperial forces, simply because of their facial characteristics. Their psychological trauma was immense; there is no way to prove oneself loyal when one is branded as disloyal solely "by blood." The local commanding general's theory was "once a Jap, always a Jap":

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

See "Final Recommendation" from General Dewitt to the Secretary of War, dated February 14, 1942, Exhibit G, Amended Complaint, JA 169.

Yet, not a single act of espionage or sabotage by Americans of Japanese ancestry in the United States was ever shown. Rather, these Americans went to extraordinary lengths to "prove" their loyalty. Most of them peacefully assembled in response to the government's orders for mass exile and imprisonment, relying on their government's promises to protect them and their property. They shunned physical re-

sistance, and instead petitioned for redress, raising hundreds of administrative and legal challenges to the wartime actions, only to suffer resounding defeats due to this Court's imprimatur of the government's claim of "military necessity." When the War Department inflicted the ultimate insult of forcibly conscripting its supposedly disloyal prisoners into racially segregated combat units, these Americans served with unequaled valor in units which suffered over 300% casualty rates and earned more commendations for bravery than any other in the war. ¶90, Amended Complaint, App. 111.

This Court three times directly upheld the mass infringement of all of these Americans' most basic freedoms solely on the basis of their race. *Korematsu v. United States*, *supra*; *Hirabayashi v. United States*, *supra*; and *Yasui v. United States*, *supra*. In so doing, this Court bestowed on the government's outrageous actions the highest stamp of approval. This Court not only condemned the women, children, and men of the plaintiff class to live out the war years in prison camps; it also established the dangerous legal precedent, which continues to "lie about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need," *Korematsu v. United States*, 323 U.S. at 246 (Jackson, J., dissenting) that the Constitution may permit mass exile and imprisonment of American citizens and residents solely on the basis of their race.[9]

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[9] As Justice Powell recognized in *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (concurring opinion), "Only two of this Court's modern cases have held the use of racial classifications to be constitutional," citing *Korematsu* and *Hirabayashi*. *See also*, L. H. Tribe, *American Constitutional Law* §§ 16-6, 16-14 (1978).

The judiciary is the last bastion for protecting the rights of minorities against abuses of government power. In light of the government's grievous fraud and deliberate obstruction of every means of judicial relief normally available to plaintiffs, this Court should not leave the question of constitutional redress to the political process, including action—or inaction—by Congress or the Executive, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), and should review the decisions below which have left plaintiffs with no judicial remedy whatsoever.

II. This Court should address the taint of decisions fraudulently procured, in order to vindicate its own processes.

This Court must confront the question—perhaps an unprecedented one—of what it should do when its own decisions have been tainted by government misconduct. When Solicitor General Charles Fried argued the jurisdictional question before this Court in the prior hearing of this case (Transcript of Oral Argument of the Solicitor General in *Hohri v. United States*, No. 86-510, April 20, 1987, pp.4-5), the government admitted for the first time in this tribunal that its wartime actions were shameful, wrong, and racially-motivated.[10] But those actions were not merely

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[10] General Fried admitted that:

> The Japanese Americans for cultural and frankly racial reasons could not be presumed to enjoy the presumption of loyalty which other Americans did and that therefore, it was too dangerous to leave them at large along the West Coast of America. It is this basing of our action on a judgment of what Justice Murphy in his dissent correctly identified as a sort of amateur socio-anthropology with a frankly

deplorable; they were duplicitous. And, it was not for want of asking by this Court that the wrong result was reached. It was not the questions which were wanting—it was the answers that the government gave.

The government's wartime explanation of the alleged "military necessity" underlying the need to imprison plaintiffs was a book entitled the *Final Report*, nominally authored by the west coast military commander, General DeWitt. During preparation of the government's wartime brief to this Court in *Korematsu*, it came to the attention of attorneys in the Department of Justice that there were serious inaccuracies in the factual underpinnings of the *Final Report*. They therefore sought to alert this Court to those inaccuracies by inserting a footnote in the government's brief, stating:

> The [Final Report's] recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in possession of the Department of Justice. In view of the contrariety of the reports on this matter, we do not ask the Court to take judicial

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racist caste which was our shame.

Respondents complain now, as they did then, that this was a wrong judgment. It was.

Hohri v. United States, No. 86-510, Transcript of Oral Argument, April 20, 1987, p. 5.

> notice of the recitals of those facts contained in the Report.

Memorandum from John L. Burling to Assistant Attorney General Wechsler, September 11, 1944, quoted in *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). Military officials, alerted to the footnote, physically intervened while the briefs were at the printer, and caused the footnote to be rewritten.[11]

Sensitive to the ramifications of whether the Court was receiving the whole truth on "military necessity" during the wartime argument of the *Korematsu* case, Chief Justice Stone specifically asked whether the *Final Report* reflected "all that was known, or could be known, by the military authorities in forming this judgment." (Transcript of Oral Argument of the Solicitor General in *Korematsu* v. *United States*, October 12, 1944, p.10). The Solicitor in response failed to disclose the authoritative contrary intelligence reports then in the government's possession, including FBI, FCC, and Office of Naval Intelligence reports, and continued to invite the Court's judicial notice of the alleged facts underlying the military commander's actions. *Id.*

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[11] For a full account of these dramatic events, *see*, Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases*, Oxford University Press (New York, 1983) Chapter 11, "The Printing Stopped About Noon," pp. 278-310. The revised footnote deleted all mention of "contrariety" of facts, and stated, "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the *Final Report* only to the extent that it relates to such facts." Brief for the United States, at 21-22, *Korematsu v. United States*, 323 U.S. 214 (1944).

In retrospect, Mr. Justice Frankfurter hit the nail most squarely on the head, asking (*Id.*, at 10-11):

> MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area." Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it.
>
> THE SOLICITOR It would not have been.
>
> MR. JUSTICE FRANKFURTER: As I understand the suggestion, it is that, as a matter of law, the report of General DeWitt two years later proved that that was exactly what the situation was. As I understand, that is the legal significance of the argument.
>
> THE SOLICITOR: That is correct, Your Honor; and the report simply does nothing of the kind.

What the Solicitor General failed to disclose was that exactly the kind of *Final Report* Mr. Justice Frankfurter envisioned had indeed been authored by General DeWitt, but all copies of it had already been ordered burned, so as not to disclose the true motives which were operating. All of these facts were not learned until very recently, *See, infra*, Argument III.

The government's wartime actions pierced the very heart of our legal system. The judicial process re-

quires that all litigants be diligent and forthright. *See, Hazel Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). But even today, the government has not told the entire story about the wartime internment; indeed, the Court has not yet required this disclosure. At the very least, to vindicate its own authority, this Court should require an evidentiary hearing in the district court on the statute of limitations issue in order to determine whether the wrongs previously committed can be righted.

This Court should right the record for the sake of the individuals who have previously been deprived of a judicial remedy because this Court's wartime precedent precluded presentation of their claims, and simply for the sake of justice.

III. The decisions below are in conflict with recent Ninth Circuit rulings that the newly discovered evidence of fraud renders relief timely.

Three separate federal district courts as well as the Ninth Circuit have found that the recently uncovered Department of Justice records showing deliberate government fraud and concealment were a timely basis for granting petitions for writs of error *coram nobis* filed in 1983 by Messrs. Korematsu, Hirabayashi, and Yasui.[12] One of these decisions, for example, states that prior to the 1980's, there was no specific evidence of governmental misconduct available:

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[12] *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal. 1984); *Yasui v. United States*, No. CV 83-151-BE, Order of January 26, 1984 (D.Ore.1984); and *Hirabayashi v. United States*, 627 F.Supp. 1445 (W.D. Wa. 1984).

> The government has also failed to rebut petitioner's showing of timeliness. It appears from the record that much of the evidence upon which the petitioner bases his motion was not discovered until recently. *In fact, until the discovery of the documents relating to the government's brief before the Supreme Court, there was no specific evidence of governmental misconduct available.*

Korematsu v. United States, 584 F. Supp. at 1419. [Emphasis added].

In a government appeal from the grant of Mr. Hirabayashi's petition for writ of error *coram nobis*, the Ninth Circuit also recently reviewed the government's claim of untimeliness and categorically rejected it. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), *petition for rehearing en banc denied*, December 24, 1987. That court began its discussion of the case by noting, 828 F.2d at 593:

> *The event which triggered the lawsuit occurred in 1982*, when an archival researcher discovered the sole remaining copy of the original report prepared by the general who issued the curfew and exclusion orders. This report was intended to explain the basis for those orders. War Department officials revised the report in several material respects and tried to destroy all of the original copies before issuing the final report. The Justice Department did not know of the existence of the original report at the time its attorneys were preparing briefs in the *Hirabayashi* and *Korematsu* cases. [Emphasis added.]

As the Ninth Circuit observed, 828 F.2d at 598, "Most significantly, the original report did not purport to rest on any military exigency, but instead declared that because of traits peculiar to citizens of Japanese ancestry it would be impossible to separate the loyal from the disloyal . . ." Continuing, the court stated, 828 F.2d at 599:

> . . . while the Supreme Court based its decision in *Hirabayashi* upon deference to the military judgment of the need for expediency, General DeWitt, the person responsible for the racially based confinement of American citizens, made no such judgment. The district court further found that the United States government doctored the documentary record to reflect that DeWitt had made a judgment of military exigency.

With regard to the materiality of the fraud, the Ninth Circuit emphasized the "critical nature of General DeWitt's decision and his report," 828 F.2d at 600, and rejected the government's position on the timeliness issue which relied on the Grodzins book and similar texts which led the district court astray in this case, 828 F.2d at 605, stating:

> The government argues that the district court should have dismissed the petitioner's claim on the ground of laches. It argues that the material upon which the petitioner relies had been a matter of public record for decades, or, alternatively, that the petitioner by due diligence should have found the material earlier. For the reasons we have discussed in the preceding section of this opinion, the district court's decision to grant the writ was

clearly based upon material which was not known until very recently. The key document upon which the district court relied was the suppressed report of General DeWitt. The district court squarely confronted the government's laches contention by stating as follows:

> . . . At no place in [the 1949 Grodzins book] is there any reference to the statements made by General DeWitt in the initial version of his Final Report. In none of the other publications submitted by the government is there any such reference.

627 F. Supp. at 1455. These findings are clearly supported.

The suppressed DeWitt report is not the only evidence which has surfaced as a result of research during this decade. There are memos, which have only recently come to light, by Justice Department lawyers Ennis and Burling, relating to the War Department's suppression of the revised report, and their doubts about the accuracy of the report . . . The discovery of these materials recently caused the District of Columbia Circuit to hold that the government's fraudulent concealment tolled the statute of limitations in cases brought by Japanese Americans for civil damages arising out of their internment. *Hohri v. United States*, 782 F.2d 227, 246 (D.C. Cir. 1986), *vacated on jurisdictional grounds*. 482 U.S. ___, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987).

Plaintiffs here cannot be taxed with a lack of diligence in their search for documentation refuting the government's claim of military necessity. In the *Hirabayashi coram nobis* proceeding, the Ninth Circuit found that Mr. Hirabayashi had been diligent in his attempt to challenge the conviction, 828 F.2d at 605, stating:

> As to the diligence of Hirabayashi in finding the material we must agree with the district judge who heard direct evidence on this issue and found that "petitioner cannot be faulted for not finding and relying upon [the only surviving copy of the initial version of the report] long before he brought this action in early 1983." 627 F. Supp. at 1455. Professional historians had failed to discover it as well, and the difficulty for a lay person to locate the initial version was documented in the record by testimony concerning its discovery.

Plaintiffs could not reasonably have been expected to find the tell-tale documents which had eluded so many historians for so many years. Judge Baldwin, dissenting from the opinion of the Federal Circuit, suggests that plaintiffs' standard of diligence should be one of "reasonableness," 861 F.2d at 783-84, and that had the plaintiffs filed their claims in the 1940's and 1950's, the case would have been dismissed on the pleadings due to the decisions in *Hirabayashi* and *Korematsu*. Plaintiffs were reasonable to wait to file their suit until the "military necessity" rationale had been rebuffed and they had evidence of a "cognizable" claim.

Thus, plaintiffs must respectfully disagree with the conclusion of the district judge below, and the two panel members of the Federal Circuit who affirmed that decision *per curiam*. In light of all that has been said before, plaintiffs must appeal to this Court for enforcement of the rigorous standards barring peremptory dismissals at the pleading stage. The district judge acted without evidentiary hearings and findings by the jury as the trier of the fact, even though the meaning and import of the recently-discovered historical record was sharply in controversy. Decisions of other district courts as well as the Ninth Circuit are facially in conflict with the rulings of untimeliness below. Given the magnitude of the interests at stake and the wrongs which concededly were committed, those rulings should not be left unreviewed.

IV. Given the unprecedented fraud on this Court and the deliberate denial of otherwise available remedies, the courts below looked too narrowly at the scope of relief for the government's wartime wrongs.

A. Plaintiffs' constitutional claims are not barred by sovereign immunity.

The lower courts' decisions establish the untenable proposition that even in this case of unprecedented and deliberate fraud, the federal judiciary is without power to award relief for mass infringements of fundamental constitutional rights. Such a rigid application of sovereign immunity doctrine is inappropriate in this case, because it would destroy all plaintiffs' constitutional rights and reward the government for perpetrating a successful fraud. Yet now that the fraud has finally been discovered, the government argues there is no judicial power to address it. The Constitution would be meaningless verbiage if the

government could commit deliberate fraud, deny all prospective relief, and then hide behind the cloak of sovereign immunity when compensatory and declaratory relief are sought as the sole remaining means of redress.

In light of the government's pervasive and deliberate wrongdoing, there is a sufficient jurisdictional predicate to hear plaintiffs' claims, based on Article III of the Constitution and existing statutory waivers of sovereign immunity. The Tucker Act, 28 U.S.C. § 1491, by its own terms waives sovereign immunity for "claims against the United States arising under the Constitution." This Court held in *United States v. Mitchell*, 463 U.S. 206, 216 (1983), that where a claim "falls within the terms of the Tucker Act, the United States has presumptively consented to suit." Thus, plaintiffs here should not need to show any further consent by Congress as a precondition to their fifteen causes of action (Counts I-XV) "arising under this Constitution." In order for claims to be actionable under the Tucker Act, this Court has further required a showing that the rights upon which plaintiffs rely must "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.*, at 217. In prior cases, this Court has looked solely to whether the constitutional right is accompanied by an express textual provision for compensation—and only the Fifth Amendment Takings Clause thus far has been interpreted as containing such a provision. In the highly unusual facts of this case, however, this Court's determination of whether a constitutional right "mandates compensation" should also be based on whether there are any other ade-

quate judicial remedies available to redress plaintiffs' injuries.[13]

In this case, all normally available judicial remedies were deliberately denied by the government as part and parcel of its own pervasive wrongdoing. Indeed, the government's unprecedented fraud upon this Court resulted in three decisions upholding the wartime deprivations and barring further legal claims

---

[13] In addition to Tucker Act jurisdiction for plaintiffs' constitutional claims (Counts I-XV), defendant's breach of contract (Count XXI), and defendant's breach of fiduciary duty (Count XXII), the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 *et seq.*, provides jurisdiction for plaintiffs' claims sounding in tort, quasi-constitutional tort, and civil rights violations (Counts XVI-XX).

Plaintiffs should not be barred from FTCA remedies for failure to file administrative claims pursuant to 28 U.S.C. § 2675(a). The very highest levels of government, including Congress, the President, and this Court, ratified the wartime actions. Any agency claims were futile. The agencies did not have power to overturn Supreme Court decisions and accord the constitutional relief which plaintiffs seek. Requiring compliance with § 2675(a) would have been a logistical nightmare and needless folly for the 120,000 claimants, or even named plaintiffs, as many of the relevant agencies no longer exist, and settlement prospects were non-existent. Any congressional interest in thorough agency investigation of claims has already been fulfilled by Congress' own Commission on Wartime Relocation and Internment of Civilians, expressly created for that purpose in 1980. Further, the agency filing requirement was not even in existence at the time the FTCA was passed and when most of the plaintiffs were still in prison camps. That requirement should not be applied now, because the government's wrongdoing prevented earlier assertion of the claims. *Accardi v. United States*, 356 F. Supp. 218 (S.D.N.Y. 1973). Accordingly, § 2675(a) should not interfere with the remedial purposes underlying the FTCA's waiver of sovereign immunity for plaintiffs' claims.

thereon: *Korematsu, Hirabayashi,* and *Yasui, supra.* Yet the constitutional rights asserted here surely require judicial vindication. If the government itself deliberately obstructed contemporaneous methods of judicial relief which would not have been barred by the defense of sovereign immunity, the government should not now be able to use "sovereign immunity" as a jurisdictional "Catch 22." To rule otherwise would allow wrongdoers to profit from their wrongs, and would eliminate the judicial branch's jurisdiction over the most egregious violations of law. *See, Hazel Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. at 2386; *United States v. Lee,* 106 U.S. 196, 218-220 (1882); and the All-Writs Act, 28 U.S.C. §1651. Given the particular circumstances of this case, the constitutional violations alleged in Counts I-XV of plaintiffs' Complaint "may be fairly interpreted as mandating compensation . . . for damages sustained." *Mitchell, supra,* 463 U.S. at 217.

Even should this Court restrict its examination to losses recoverable only under the Takings Clause, takings of "property" in this case should be interpreted to include the destruction of vested constitutional rights on which all notions of "property" are based. The Constitution creates settled expectations of liberty and justice, breaches of which are normally actionable via prospective injunctive action, habeas corpus, and the like. When egregious wrongful conduct occurs and judicial remedies are deliberately obstructed, the right to judicial relief must be held to vest, and to be actionable retrospectively after cessation of the obstructive conduct. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982); *Pitts v. Unarco Industries, Inc.,* 712 F.2d 276, 279 (7th Cir. 1983).

In the ultimate analysis, this Court may create a comprehensive remedy for government's egregious conduct, and need not be constrained to find an express statutory waiver of sovereign immunity. As Justice Harlan stated in *Bivens v. Six Unnamed Agents*, 403 U.S. 388, 407 (1971) (concurring):

> The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. [Citations omitted.] In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range a legislature would consider with respect to an express statutory authorization of a traditional remedy.

Creation of such a remedy is appropriate in this case. The magnitude of the wrong is so great that, as in *Bivens*, the Court must fashion a remedy to right it. Here as in *Bivens*, "It is damages or nothing, so damages it must be." *Id.*, at 410.

Article III jurisdiction extends to all cases "arising under this Constitution" and "to controversies to which the United States shall be a party." Historically, Article III has provided a jurisdictional basis to hear and redress claims for constitutional injuries: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). *See Note: Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U.L. Rev. 597 (1982); *Comment: Sovereign Immunity — An Anathema to the "Constitutional Tort,"* 12 Santa Clara Lawyer 543, 556-59 (1972).

This Court held in *Bell v. Hood*, 327 U.S. 678 (1946), that the federal judiciary has inherent power under Article III to hear claims against the United States for constitutional violations, and to create all necessary remedies to enforce federal constitutional rights. In *Bivens, supra*, this Court created a retrospective damages remedy against federal officials for constitutional infringements, because other relief was unavailable. In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court extended damages remedies to constitutional violations by municipalities, stating: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Certainly, the Court here should do no less with respect to deliberate constitutional violations by the federal government.

This case is *sui generis*. *Hohri v. United States*, 782 F.2d at 249 (D.C. Cir. 1986). An effective remedy in this case need not be held to expand the general rule of sovereign immunity in other cases, where governmental wrongdoing was not as egregious, or prospective legal remedies were not fraudulently withdrawn.

This Court should hold that it has inherent Article III jurisdiction to authorize review and redress of plaintiffs' injuries so as to redress the assault on its own integrity resulting from the government's fraud, and it should so order.

B. A fiduciary duty existed here.

It is especially important for this Court to review the fiduciary duty issues raised here in the context of its ruling in *United States v. Mitchell,* 463 U.S. 206 (1983). The district court held there was no such actionable duty in this case. App. 60-61. Yet, in its program of mass exclusion and internment pursuant to Executive Orders 9066 and 9102, the government clearly did undertake express and implied fiduciary responsibilities toward plaintiffs by pervasive control of every aspect of their daily lives, and by forcing them into a position of dependency and exploitation. *See, e.g.,* Exhibits, O, P, and Q to Amended Complaint, JA 196-216. Plaintiffs depended on the government for their every need. Fiduciary relationships have been recognized to arise as a result of similar pervasive government control of Indians, *United States v. Kagama,* 118 U.S. 375 (1886); *Short v. United States,* 719 F.2d 1133 (Fed. Cir. 1983); *Moose v. United States,* 674 F.2d 1277 (9th Cir. 1982); *Oldland v. Gray,* 179 F.2d 408, 414 (10th Cir. 1950). The same is true for Bikini Islanders, *Juda v. United States,* 6 Cl. Ct. 441 (1984).

All the elements of a traditional fiduciary relationship are present here. The government repeatedly stated it was acting for the benefit of plaintiffs, and promised expressly to protect their rights and property. The courts below looked too narrowly for an express statutory creation of a fiduciary relationship, instead of considering all applicable statutes, regulations and governmental pronouncements as part of the total circumstances which must be examined in ruling on this issue. *Gila River Pima-Maricopa Indian Community v. United States,* 9 Cl. Ct. 660 (1986);

White Mountain Apache Tribe of Arizona v. United States, 9 Cl. Ct. 1 (1985). It was plain error to deny a remedy for breach of fiduciary duty without even an evidentiary hearing to explore and resolve the factual issues inherent in such an inquiry. *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983); *Bell v. Hood,* 327 U.S. 678, 681-83 (1946). Accordingly, this Court should recognize plaintiffs' right to prove the existence of a fiduciary relationship giving rise to compensable claims under the Tucker Act, and reverse the judgments below so as to allow plaintiffs a hearing on that claim, and other issues.

CONCLUSION

For the above reasons, this Court should grant the writ of *certiorari* to review the full scope of remedies available to plaintiffs and to redress the unprecedented wrongs to petitioners and this Court.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

88-215
No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM HOHRI, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for The Federal Circuit

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1635

WILLIAM HOHRI; HANNAH TAKAGI HOLMES; CHIZUKO OMORI, IND. AND REP. FOR HARUKO OMORI; MIDORI KIMURA; MERRY OMORI; JOHN OMORI, IND. AND REP. FOR JURO OMORI; GLADYCE SUMIDA; KYOSHIRO TOKUNAGA; TOM NAKAO; HARRY UENO; EDWARD TOKESHI; RENTARO HASHIMOTO; NELSON KITSUSE, IND. AND REP. FOR TAKESHI KITSUSE; EDDIE SATO; SAM OZAKI, IND. AND REP. FOR KYUJIRO OZAKI; KUMAO TODA, IND. AND REP. FOR SUKETARO TODA; KAZ OSHIKI; GEORGE R. IKEDA; TIM TAKAYOSHI; CATHY TAKAYOSHI; NATIONAL COUNCIL FOR JAPANESE AMER. REDRESS,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

Benjamin L. Zelenko, Landis, Cohen, Rauh and Zelenko, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief were *B. Michael Rauh* and *Martin Shulman.*

Jay S. Bybee, Department of Justice, of Washington, D.C., argued for defendant-appellee. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *Joseph E. diGenova,* United States Attorney, *Jeffrey Axelrad,* Director, Torts Branch and *Barbara L. Herwig.*

Appealed from: U.S. District Court for the District of Columbia

Judge Oberdorfer

UNITED STATES COURT OF APPELAS
FOR THE
FEDERAL CIRCUIT

87-1635

WILLIAM HOHRI; HANNAH TAKAGI HOLMES; CHIZUKO OMORI, IND. ANMD REP. FOR HARUKO OMORI; MIDORI KIMURA; MERRY OMORI; JOHN OMORI, IND. AND REP. FOR JURO OMORI; GLADYCE SUMIDA; KYOSHIRO TOKUNAGA; TOM NAKAO; HARRY UENO; EDWARD TOKESHI; RENTARO HASHIMOTO; NELSON KITSUSE, IND. AND REP. FOR TAKESHI KITSUSE; EDDIE SATO; SAM OZAKI, IND. AND REP. FOR KYUJIRO OZAKI; KUMAO TODA, IND. AND REP. FOR SUKETARO TODA; KAZ OSHIKI; GEORGE R. IKEDA; TIM TAKAYOSHI; CATHY TAKAYOSHI; NATIONAL COUNCIL FOR JAPANESE AMER. REDRESS,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

DECIDED: May 11, 1988

Before RICH, *Circuit Judge,* BALDWIN, *Senior Circuit Judge,* and NIES, *Circuit Judge.*

PER CURIAM.

This appeal comes to this court following the decision of the Supreme Court in *United States* v. *Hohri,* 482 U.S. ___, 107 S.Ct. 2246 (1987) (vacating judgment of District

of Columbia Circuit and remanding with instructions to transfer to this court pursuant to 28 U.S.C. § 1631 (1982)). In *Hohri*, the Supreme Court held that a case which presents both a nontax claim under the "Little Tucker Act," 28 U.S.C. § 1346(a)(2) (1982), and a claim under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1982), as here, may be appealed only to the Court of Appeals for the Federal Circuit.

The appeal here is from the judgment of the United States District Court for the District of Columbia, 586 F. Supp. 769 (D.D.C. 1984) (Oberdorfer, J.), dismissing the claims of nineteen individuals and an organization of Japanese-Americans which sought damages and declaratory relief for injuries resulting from the internment of Japanese-Americans during World War II. The district court held, *inter alia*, that appellants' claims were barred by applicable statutes of limitations.

Each of the numerous issues raised to this court is fully addressed in the opinion of Judge Oberdorfer. After a meticulous review of that opinion, we are unpersuaded of any error. We see no need to restate or elaborate on the district court's careful and scholarly analysis, nor to burden appellants with further delay. Accordingly, we affirm for the reasons stated in the district court opinion.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE
FEDERAL CIRCUIT

87-1635

WILLIAM HOHRI; HANNAH TAKAGI HOLMES; CHIZUKO OMORI, IND., AND REP. FOR HARUKO OMORI; MIDORI KIMURA; MERRY OMORI; JOHN OMORI, IND. AND REP. FOR JURO OMORI; GLADYCE SUMIDA; KYOSHIRO TOKUNAGA; TOM NAKAO; HARRY UENO; EDWARD TOKESHI; RENTARO HASHIMOTO; NELSON KITSUSE, IND,. AND REP. FOR TAKESHI KITSUSE; EDDIE SATO; SAM OZAKI, IND. AND REP. FOR KYUJIRO OZAKI; KUMAO TODA, IND. AND REP. FOR SUKETARO TODA; KAZ OSHIKI;. GEORGE R. IKEDA; TIM TAKAYOSHI; CATHY TAKAYOSHI; NATIONAL COUNCIL FOR JAPANESE AMER. REDRESS,

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

BALDWIN, *Senior Circuit Judge,* dissenting-in-part.

The majority adopts, *in toto,* the District Court's opinion, *Hohri* v. *United States,* 586 F. Supp. 769 (D.C.C. 1984). Although I agree with much of what the trial judge says, I respectfully dissent because I believe he erred in concluding that appellants' takings claims are barred by the statute of limitations.

Appellants' claims are dismissed under rule 12(b)(1), for lack of subject matter jurisdiction. In reviewing a dismissal under this rule, "[t]he issue is not whether a plaintiff will

ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). Even if it "appear[s] on the face of the pleadings that a recovery is very remote and unlikely," *id.*, the motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). Thus, in reviewing the trial judge's decision, this court is obliged to review independently his application of the law to the undisputed facts in the historical record and the pleadings.[1]

The trial judge correctly determined that appellants had stated a takings claim, and that the portion of appellants' takings claims concerning constitutional rights other than property rights were unfounded. 586 F. Supp. at 783. I believe, however, that the trial judge incorrectly decided that appellants' remaining takings claims were barred by the applicable six year statute of limitations. 28 U.S.C. § 2401(a) (1982).[2] The trial judge rejected appellants' contention that the statute of limitations was tolled as a result of the government's fraudulent concealment of information relating to the military necessity for relocating and interning Japanese-Americans during World War II. 586 F. Supp. at 786-91. Instead, he found that appellants failed to exercise due diligence in asserting their claims. *Id.* at 790-91. He found that a reasonably diligent plaintiff would

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[1] The Supreme Court settled long ago that a district court judge may inquire, through affidavits or otherwise, into the facts as they exist when a question of the court's jurisdiction is raised. *See Land* v. *Dollar*, 330 U.S. 731, 735 and n.4 (1947).

[2] The trial judge felt it unnecessary to decide the exclusivity of the American-Japanese Evacuation Claims Act, 50 U.S.C.App. §§ 1981-1987. As discussed, *infra*, this Act's exclusivity provision applies to those in appellants' class who have received a payment under the Act, but does not act to bar the takings claims of those who did not recover under it.

have discovered sufficient evidence to state a claim as early as the late 1940's. *Id.* I cannot agree that the government's fraudulent concealment of vital information did not toll the statute.

The statute of limitations to which appellants' claims are subject is enumerated in 28 U.S.C. § 2401(a) (1982):

> Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first *accrues*. [Emphasis added]

The question, therefore, is when appellants' right of action first "accrued." The trial judge decided that appellants' claims accrued, at the latest, some time in the late 1940's, following publication of the Ringle, Fly, and Hoover documents. 586 F. Supp. at 790.

As a general rule, a statute of limitations is tolled where a defendant fraudulently or deliberately conceals material facts relevant to a plaintiff's claim, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946); *Korody-Colyer Corp.* v. *General Motors Corp.*, 828 F.2d 1572, 1576-78 (Fed. Cir. 1987); *cf. Albert* v. *Kevex Corp.*, 729 F.2d 757, 763 (Fed. Cir. 1984), *provided* the plaintiff could not, through the exercise of due diligence, have discovered the basis of the claim. *Holmberg*, 327 U.S. at 397. This doctrine is as applicable to the United States as to any defendant. *See Welcker* v. *United States*, 752 F.2d 1577, 1580 (Fed. Cir. 1985); *Japanese War Notes Claimants Ass'n of the Philippines, Inc.* v. *United States*, 373 F.2d 356 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). As the trial judge pointed out, 586 F. Sup. at 787-88, the parties do not dispute that appellee concealed various intelligence reports which contradicted the claim of military necessity raised in *Hirabayashi* and *Korematsu*. The parties do dispute, however, the effect this concealment had on the accrual of appellants'

claims, and the duration of the effective concealment of sufficient matter to delay such accrual.

Appellants argue that their claims did not accrue until the completion of work by the Commission on Wartime Relocation and Internment of Civilians (CWRIC), established by Pub. L. No. 96-317, 94 Stat. 964, 96th Cong., 2d Sess. (1980), and the publication of the CWRIC Report of its investigations entitled *Personal Justice Denied* in 1982. Appellants' position is that the Supreme Court erected an insurmountable legal barrier with its decisions in *Hirabayashi* v. *United States,* 320 U.S. 81 (1943) and *Korematsu* v. *United States,* 323 U.S. 214 (1944), when it upheld the internment policy in deference to the military. This barrier could be removed they assert only by an affirmative statement by one of the "war-making" branches that military necessity did not require the internment policy. They argue that the creation of CWRIC and the publication of *Personal Justice Denied* is the first event constituting such a statement. This conclusion is premised upon the disclosure in *Personal Justice Denied* that the government fraudulently concealed significant and vital information concerning its role in the *Korematsu* and *Hirabayashi* decisions. Appellants say that this fraudulent behavior precluded them from seeking relief in the courts because the level of deference shown by the Supreme Court in *Korematsu* and *Hirabayashi* to military decision making rendered any claim virtually frivolous. Thus, the statute of limitations should, they assert, be tolled until 1980 or 1982.

In opposition, appellee asserts that appellants' claims accrued at the time of the taking because that is when appellants knew of the injury and its cause. In the alternative, appellee argues appellants' claims accrued at one of several later dates: (1) when the Ringle, Fly, and Hoover documents first appeared; (2) when other books about the interning of Japanese-Americans appeared in the 1950's; or (3) at the latest, when President Ford signed Presi-

dential Proclamation 4417 in 1976 declaring the incident a "mistake." The basis for this position is that the facts concealed concerned a potential affirmative defense of military necessity and not the appellants' cause of action. This is, as the trial judge realized, a mere technical distinction, 586 F. Supp. at 787, especially where, as here, the Supreme Court sanctioned this affirmative defense as a bar to cases questioning the propriety of the internment policy. *Korematsu*, 323 U.S. at 218, quoting *Hirabayashi*, 320 U.S. at 99, ("We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.")[3] Appellee's assessment of the impact of *Hirabayashi* and *Korematsu* is a faulty one. These cases had the effect of validating the exclusion orders *in toto* as compelled by military necessity. 323 U.S. at 218. Appellee's suggestion that the holding in *Ex Parte Kawato*, 317 U.S. 69, 78 (1942) permitting nonresident aliens of Japanese ancestry to prosecute civil suits opened the court doors is misplaced in this case.[4] The courthouse door was not closed to these appellants in the manner at issue in *Kawato*. Rather, here the courts were *effectively* closed by the Supreme Court to evacuated and interned Japanese-Americans to challenge the validity of the exclusion orders. The Supreme Court's decision to defer to military authorities was con-

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[3] Appellee's argument (Brief of Appellee at 30-31) that subsequent Supreme Court cases opened the door to appellants' claims is unconvincing. The cases cited by the government deal with different situations and statutes unrelated to appellants' internment and exclusion.

[4] Appellee seeks to lump these Japanese-Americans with all other Japanese-Americans affected by the war who obtained some relief. Aside from the insensitivity to appellants' treatment this position evinces, the suggestion fails to distinguish between those Japanese-Americans affected by the exclusion and internment orders, and other Japanese-Americans affected by distinct acts of Congress.

stitutionally based. Even though it stated in *Korematsu* that racial classifications were "immediately suspect," the Court left little room for judicial evaluation of the propriety of the orders when it agreed with its earlier position in *Hirabayashi* that the authority vested in the military by the exclusion orders was "not wholly beyond the limits of the Constitution," 320 U.S. at 101-02, and that "Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety." 323 U.S. at 218. Once the courthouse doors were effectively closed, it did not matter that appellants knew of the existence of their injury and the identity of the defendant.[5] Appellants may have been on notice to inquire, but this knowledge left them in no better position where the available information and Supreme Court decisions precluded them from filing a good faith claim.

This court's decisions in *Welcker*, supra, *Braude*, supra, and *Japanese War Notes Claimants Ass'n*, supra, are not to the contrary. None of those cases included a prior judicial determination which resulted from the defendant's fraudulent conduct. These appellants' claims were effectively foreclosed by *Hirabayashi* and *Korematsu* as a direct result of appellee's conduct.

Where a defendant fraudulently conceals information, and that concealment has the effect of dooming a plaintiff's claims at the outset, the statute of limitations should be tolled until such time as the plaintiff discovers or should

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[5] *United States* v. *Kubrick*, 444 U.S. 111 (1979) is not to the contrary. *Kubrick* addressed when a cause of action accrues where no fraudulent concealment has been alleged. At least two appeals courts have rejected extending *Kubrick* to cases where fraudulent concealment is alleged. *Arvayo* v. *United States*, 766 F.2d 1416, 1422 (10th cir. 1985); *Barrett* v. *United States*, 689 F.2d 324, 328-30 (2d Cir. 1982). *Compare Premium Management, Inc.* v. *Walker*, 648 F.2d 778, 783 n.7 (1st Cir. 1981) (*dicta* suggesting *Kubrick* might apply to cases turning on fraudulent concealment).

have discovered, through due diligence, the facts concealed. Under this standard, it would not matter whether the information concealed went to a claim or an affirmative defense. If it can be said that a plaintiff's claim would not survive a motion to dismiss on the pleadings *because* the defendant fraudulently concealed information relevant to an *essential* element of the claim, I would find the statute tolled until such time as a plaintiff, exercising due diligence, could discover the information.

Appellee's actions during the War clearly constituted fraudulent concealment. The district court found, based on the pleadings and the historical evidence, that appellee did, in fact, conceal critical evidence during the prosecution of *Hirabayashi* and *Korematsu* before the Supreme Court. 586 F. Supp. at 787-88. But the court found that once the Hoover, Fly, and Ringle documents, all objects of concealment, were leaked, the statute began to run. *Id.* I disagree that these documents were sufficient to rebut the presumption of military deference provided by the Supreme Court in *Hirabayashi* and *Korematsu*. These documents constituted only a small portion of the information concealed, and by no means the most important information.

The Supreme Court was not without contradictory assertions in *Hirabayashi* and *Korematsu*. The Japanese-American Citizens League (JACL) included in its amicus brief in *Korematsu* statements by the Attorney General and the Secretary of War (and even by President Roosevelt himself) made in 1941 and 1942 that indicated the west coast was not under any serious threat of invasion. JACL Brief at 82-87. Thus, in deferring to the military evaluation of the situation, the Court must have recognized that the military judgment was one reached after weighing the relevant alternatives. The leaked documents merely provided opinions of certain military intelligence officers. It is likely that the Court would have been unwilling to decide whether these reports were sufficient to rebut the decision reached where it was represented that no other

information existed to the contrary. The Court specifically refused to delve into the military's reasoning. *Korematsu*, 323 U.S. 218-19. It is equally likely that, with the information available, any complaint filed by appellants would have resulted in dismissal because of the Supreme Court's mandated deference to the military authorities on the issue. It does not, to me, require much imagination to realize that without the military necessity argument the Supreme Court would not have permitted the exclusion and internment orders to go forward. Thus, the leaking of the Fly, Ringle, and Hoover documents should not have been held sufficient to start the clock, and the statute should have remained tolled until a later date.

The statute having been tolled by appellee's fraudulent concealment, the question remaining is when did it begin to run? The traditional standard applied by this court is that appellants "must either show that [appellee] has concealed its acts with the result that [appellants were] unaware of their existence or [appellants] must show that [their] injury was 'inherently unknowable' at the accrual date." *Welcker*, 752 F.2d at 1580, quoting *Japanese War Notes Claimants Ass'n*, 373 F.2d at 359. Generally, it would be sufficient that appellants were on notice to inquire that they had a potential claim, *id.*, and it is "irrelevant for limitations purposes that [appellants did not] learn[ ] until later that [they] had *further* support for [their] decision." 752 F.2d at 1582 (emphasis in original).

Strict application of this rule without regard for appellants' peculiar circumstance would yield the result reached by the trial court and majority. Appellants were readily aware that their property had been taken at the time they were excluded and interned. There was no question as to who had committed the acts against them. According to the trial court, the only obstacle in their way was a pair of Supreme Court decisions upholding appellee's actions and granting complete deference to the military's judgment. Under this logic, appellants, had they acted with

due diligence, should have filed their claims in the forties or fifties. At that time, however, with the information available, they were destined for dismissal on the pleadings.

Application of this rule in appellants' situation is, I believe, inappropriate and inequitable. Instead, I would judge appellants' diligence according to whether they acted reasonably under the circumstances. Our decisions suggest holding that appellants had knowledge of their claims when they were on notice to inquire about their *potential* claims. *Welcker,* supra. In a situation such as this, this standard should be applied in such a way that appellants are not barred until such time as they were able to obtain sufficient knowledge of the factual basis of their claims to allow them to file a *good faith* complaint.[6] Before the statute could begin to run against appellants, there had to be sufficient evidence in the public domain to permit appellants to state a claim. In the peculiar facts of this case, this means that appellants needed enough facts to potentially rebut the Supreme Court's presumption of deference. Thus, the evidence concealed by appellee must have been sufficient to provide appellants with enough facts to make a good faith determination that they could *potentially* rebut this presumption. The leaked documents, as noted earlier, could not suffice to defeat the presump-

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[6] The filing of frivolous claims (and appeals) is a serious matter in today's judicial system. Rule 11 of the Federal Rules of Civil Procedure has evolved into a strong judicial weapon against claims which do not have a good faith basis. With the emphasis on developing a good faith basis for complaints *before* they are filed (and the concomitant distaste for using discovery for unknowing fishing expeditions) it is ironic that the standard for tolling the statute of limitations does not include Rule 11's principles. Forcing claimants to file a suit which may be subject to Rule 11 sanctions [or is likely to be dismissed on the pleadings] to beat a statute of limitations defense is not sound judicial policy. Even though Rule 11 did not have the bite it now has in the 1940s and 1950s, appellants should not be penalized for failure to file a timely claim which could not then be substantiated.

tion erected. It was not until CWRIC exposed and declassified a wealth of intelligence information that appellants became aware of the existence of adequate facts indicating that sufficient concealment had occurred to cast sincere doubt upon the Supreme Court's *Hirabayashi* and *Korematsu* holdings.

The additional information was available to the Justice Department at the time it prepared the briefs in those cases. Appellee did not present evidence indicating that appellants should have, or could have, known of the existence of this additional information solely because of the presumed knowledge of the Ringle, Fly, and Hoover documents. There were only two means for appellants to obtain this information: (1) by Executive declassification;[7] or (2) by Act of Congress. In this case, the latter occurred before the former.

The act creating CWRIC, Pub. L. No. 96-317, 94 Stat. 964 (1980) supports this reasoning. Section 2(a)(3) states that "no sufficient inquiry has been made" into the exclusion and internment. Section 2(b)(1) says one of the purposes of the Act was to "review the facts and circumstances surrounding" the exclusion and internment. This was the first intimation by any branch of the government that the Court's deference to the military was *legally* erroneous and possibly subject to attack. Prior statements simply noted the immorality of the actions. *See, e.g.*, Presidential Proclamation No. 4417 (1976); H.R. Rep. No. 732, 80th Cong., 1st Sess. (1947) (Report accompanying the American-Japanese Evacuation Claims Act stating that the "only clear recourse" for the victims was through private bills, suggesting that the evacuees could not state an actionable claim); S. Rep. No. 601, 82d Cong., 1st Sess.

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[7] It is unnecessary to consider whether a Freedom of Information Act request would have yielded these documents, although it is unlikely because of their continued classification, because appellee made no showing that appellants should have known of their existence.

(1951) and H.R. Rep. No. 496, 82nd Cong., 1st Sess. (1951) (amendments to same act restating same view); H.R. Rep. No. 1809, 84th Cong., 2d Sess. (1956) (amendments to same act referencing earlier legislative history). In fact, the reports mentioned at various points that Congress did not believe appellants suffered any actionable wrongs. *See* H.R. Rep. No. 496, supra, at 2-3.

The Attorney General concurred in this assessment. As the official charged with administering the American-Japanese Evacuation Claims Act, the Attorney General in the case of *Claim of Mary Sogawa,* 1 Adjudications of the Att'y Gen. 126 (Dec. 20, 1950) stated that his decision to reject a claim for certain expenses of preparing for and returning after the evacuation was premised on his belief that the Act did not acknowledge that the evacuees suffered an actionable wrong. His opinion stated that the Act's legislative history made it clear that the Act "was intended to be an act of bounty," and that "in the teeth of the decision of the Supreme Court in the *Korematsu* case" the evacuation could not be characterized as "constitut[ing] a *legal* wrong." *Id.* at 134 (emphasis added).

These Congressional and Executive statements evince a general assumption that the *Hirabayashi* and *Korematsu* decisions barred civil as well as criminal actions by appellants. Thus, it is difficult for me to agree with the trial court's result and the majority's affirmance which suggest that appellants should not have been deterred by those decisions from filing a good faith complaint. Rather, if the prevailing presumption in the war making branches was the belief that appellants did not have a cognizable claim, it is eminently reasonable that appellants felt the same way. The issue should be, as I suggested earlier, whether appellants were reasonable in their determination that they could not state a cognizable claim, not whether appellants were absolutely certain they had no claim. During a time of heightened awareness of unsubstantiated claims, I am hesitant to impose upon appellants a standard

stiffer than reasonableness. I would hold, therefore, that appellants acted *reasonably* in failing to bring their claims with only the Ringle, Fly, and Hoover documents to support their position, and no clear indication that further information had been fraudulently concealed from the Supreme Court. I would find that the statute of limitations for appellants' takings claims was tolled until the issuance of the CWRIC Report, *Personal Justice Denied*, or, at the earliest, at the time when the information in the Report became public.

Having found appellants takings claim timely, I would, nonetheless, not permit all takings claims. Specifically, I would reject claims brought by members of appellants' class who earlier recovered under the American-Japanese Claims Act, 50 U.S.C. App. §§ 1981-1987 (1982). Section 1984(d) of that Act states that "the payment of an award shall be final and conclusive for all purposes, * * * and shall be a *full discharge of the United States and all of its officers, agents, servants, and employees with respect to all claims arising out of same subject matter.*" (Emphasis added). The subject matter to which the provision refers is the "evacuation or exclusion" of Japanese-Americans. *Id.* at § 1981(a). This statute presented appellants with a clear choice, litigation of their rights versus the "bounty" offered.

It is unnecessary to consider whether this statute may have constituted an exclusive remedy for the wrongs committed here, because the language of § 1984(d) specifically states that "full discharge" occurs only upon "payment of an award." Thus, it would be unreasonable to restrict access to the federal courts for those appellants who did not receive a payment under that Act. The clear language of the statute indicates that merely bringing a claim is not enough to execute a full discharge, thus it also is unnecessary to consider whether Congress acted beyond its power in forcing appellants to choose between a court case and an administrative "settlement."

Clearly Congress' offer was made in good faith, and thus appellee should not be estopped from raising § 1984(d) against those appellants who received a "payment" under the Act. *See Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61 (1984) (assertion of estoppel against the government requires, at a minimum, a demonstration "that the traditional elements of an estoppel are present," saving for a later time whether estoppel can ever apply to the government). However, the remaining appellants should be permitted to raise their takings claims.

Our nation has evolved tremendously since the incidents which gave rise to this action occurred. So, too, our government institutions have matured since that time. Unfortunately, we have not yet erased the possibility of abuse of individual citizens or groups of citizens. Fortunately, we have adequate means in our laws and our Constitution for those harmed by governmental actions to seek recompense in the courts. While the statute of limitations seeks justly to protect the United States from endless claims that may be age old, it does not behoove our society to sanction the perpetration of fraud by the sovereign. Appellants are, I believe, entitled to their day in court to attempt to prove their allegations that their property was taken, and that they are entitled to relief for that taking. Whether they will succeed is irrelevant at this point. In my opinion, appellee's actions before this nation's highest Court, and its long concealment of the factual basis of appellants' claims entitles appellants to the opportunity to try. I would therefore reverse that portion of the trial judge's opinion dismissing the takings clause claims for those appellants who did not receive payment under the American-Japanese Evacuation Claims Act.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0750

WILLIAM HOHRI, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED

May 17, 1984

ORDER

For the reasons stated in the accompanying Memorandum, it is this 17th day of May, 1984, hereby

ORDERED: that defendant's motion to dismiss should be, and hereby is, GRANTED; and it is further

ORDERED: that plaintiffs' complaint should be, and hereby is, DISMISSED.

/s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0750

WILLIAM HOHRI, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

FILED

May 17, 1984

MEMORANDUM

During World War II, the United States government removed some 120,000 American citizens and residents of Japanese ancestry from their West Coast homes and placed them in internment camps for up to four years. The stated reason for this unprecedented policy of evacuation and incarceration was "military necessity": the Nation was at war with Japan, and military officials feared that members of the American Japanese population would engage in sabotage, espionage, and other activities harmful to the war effort.

In 1983, nineteen individuals who were interned during the war or descended from internees and an organization of Japanese Americans filed this suit against the United

States.[1] They allege that the program of exclusion and internment was wrongful and seek compensation for injuries suffered as a result of it. They claim that there was no military necessity for the program and that it was instead motivated by "race prejudice, war hysteria, and a failure of political leadership."[2] Furthermore, they allege that government and military officials were aware of this lack of military justification but conspired to suppress that information when the program was implemented, when it was later challenged in court, and, in fact, almost to the present. Plaintiffs claim to have suffered deprivation of their constitutional rights, loss of homes, businesses, educations, and careers, physical and psychological injuries, including loss of life, destruction of family ties, and personal stigma. The complaint contains twenty-two counts; each plaintiff seeks compensatory damages for each tort claim and $10,000 for each cause of action not sounding in tort.[3]

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[1] Plaintiffs have moved for class action certification, defining the class as the approximately 120,000 citizens and permanent residents, and representatives of such persons no longer living, who were "subjected to forcible segregation, arrest, exclusion, imprisonment, curfew and travel restrictions, deportation, loss of citizenship, or other deprivations of their civil rights and liberties" because of their Japanese ancestry pursuant to actions and orders of the United States. Plaintiffs' Motion for Class Action Certification (June 14, 1983). By agreement of the parties, decision on the class action motion has been postponed pending resolution of defendant's motion to dismiss.

[2] Complaint, ¶3 (quoting Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 18 (1982)). the Commission was established by act of Congress in 1980 to review the treatment of Japanese Americans during World War II and recommend appropriate remedies. Its report, which concludes that there was no military necessity for the program and that this fact was known by responsible officials during the war, is in large part the genesis of this suit. *See* Plaintiffs' Supplemental Memorandum on the Statute of Limitations at 2-3 (Jan. 20, 1984).

[3] Plaintiffs also seek relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the All Writs Act, 28 U.S.C. § 1651.

The defendant United States has moved to dismiss plaintiffs' claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. That motion proceeds on three grounds. First, defendant asserts that plaintiffs' action is barred by the applicable statutes of limitation. Second, defendant alleges that the American-Japanese Evacuation claims Act, 50 U.S.C. App. §§ 1981-1987, is the exclusive remedy for claims arising from the internment program. Third, defendant asserts that there is no constitutional provision, statute, or regulation that waives the federal government's sovereign immunity against these claims for money damages.[4]

Plaintiffs oppose the motion to dismiss. They claim that alleged suppression by defendant of information contradicting the military necessity rationale constituted fraud sufficient to toll the running of the statutes of limitation. They dispute that the Evacuation Claims Act is exclusive of other remedies, because it fails to comport with constitutional standards of due process, just compensation, and equal protection. Finally, they point to several statutes and constitutional provisions which they claim act to waive the federal government's sovereign immunity against this suit.

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[4] An affirmative defense such as a bar by a statute of limitations normally is raised through a motion to dismiss based on Rule 12(b)(6). In this suit against the United States, however, the relevant statutes of limitation are conditions placed on waivers of sovereign immunity. As such, their expiration would deprive the Court of subject matter jurisdiction. In that case, a statute of limitations defense would be raised through a motion to dismiss based on Rule 12(b)(1). *See D.C. Transit System, Inc. v. United States*, 717 F.2d 1438, 1440 n.1 (D.C. Cir. 1983); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 139-40 (Supp. 1984). Defendant cites both rules in support of its motion. This ruling is based on Rule 12(b)(1).

Defendant also moves to dismiss for improper venue under Rule 12(b)(3). The Court does not reach that question.

I.

In evaluating a motion to dismiss under Rule 12(b)(1), a court must construe the allegations of the complaint "favorably to the pleader." *Walker v. Jones,* No. 83-1425, slip op. at 3 (D.C. Cir. May 1, 1984) (quoting *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)). In addition, a court may consider material outside the pleadings, such as official documents, matters of general public record, and historical publications. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 549-50 (1969). The following recitation of the facts is drawn from plaintiffs' complaint, official documents attached as exhibits to the complaint, the 1982 report of the Commission on Wartime Relocation and Internment of Civilians,[5] and other published historical accounts cited by the parties.

The use of official historic documents is particularly appropriate here. They relate to events which occurred more than forty years ago. Most of the actors who might give better evidence are no longer living. It is unlikely that the historical facts recounted in the documents can ever be the subject of a material dispute. Moreover, although the government could offer the documents to support its defense, they are more embarrassing to the government than self-serving. Accordingly, the document have been considered in ruling on this motion to dismiss for lack of subject matter jurisdiction. *See Capitol Industries-EMI, Inc. v. Bennett,* 681 F.2d 1107, 1118 n.29 (9th Cir.), *cert. denied,* 103 S.Ct. 570 (1982).

A.

On December 7, 1941, a carrier-based force of Japanese aircraft attacked the American fleet at Pearl Harbor, inflicting heavy losses. The next day, the United States declared war on Japan. Steps to control the activities of

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[5] Hereinafter cited as *Personal Justice Denied.*

Japanese nationals in the United States began immediately. On December 8, President Roosevelt proclaimed that residents of Japanese nationality were "alien enemies." Proclamation No. 2525, 6 Fed. Reg. 6321 (1941). The proclamation authorized the Attorney General to regulate their conduct and to apprehend any such persons "deemed dangerous to the public health or safety of the United States."[6] Pursuant to other proclamations, cameras, weapons, radio transmitters, and other instruments of possible sabotage and espionage that belonged to enemy aliens were confiscated. Internment of alien enemies—Japanese, German, and Italian—who were believed to be dangerous began immediately. In late January and early February, the Attorney General ordered that enemy aliens could not enter some 84 designated areas of military significance on the West Coast.

These restrictions, however, did not satisfy Lieutenant General John L. DeWitt, who as Commanding General of the Western Defense Command was responsible for West Coast security. The general urged that military necessity required increasing the geographic area of exclusion and barring American citizens, as well as aliens, of Japanese descent. In this, he was supported by public officials and popular opinion on the West Coast, where there was a history of antagonism toward the Japanese. Consultation among members of the Western Defense Command, the War Department, and the Justice Department culminated with a formal recommendation by General DeWitt to Secretary of War Henry L. Stimson "for the evacuation of Japanese and other subversive persons from the Pacific Coast." *Final Recommendation of the Commanding General, Western Defense Command and Fourth Army to the Secretary of War* (Feb. 14, 1942) (Complaint, Exhibit G). On February 18, officials of the War and Justice Depart-

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[6] German and Italian aliens were given the same status in Proclamation Nos. 2526, 2527, 6 Fed. Reg. 6323, 6324 (1941).

ments met to draft such an order, and it was signed by President Roosevelt on February 19 as Executive Order 9066, 7 Fed. Reg. 1407 (Complaint, Exhibit H).

Executive Order 9066 authorized the Secretary of War and military commanders to whom he delegated authority to prescribe "military areas" from which any persons could be excluded.[7] The next day, Secretary of War Stimson delegated his authority under Executive Order 9066 to General DeWitt. Within ten days, DeWitt designated the western halves of California, Oregon, and Washington and the southern third of Arizona as "military areas" from which all persons of Japanese ancestry were to be removed. Later, he expanded the evacuation area to include the rest of California.

Relocation was tried first on a voluntary basis. Japanese Americans were instructed to move outside the military areas but were free to go wherever they chose. At the same time, curfews and reporting requirements were imposed. The voluntary program quickly proved unworkable. Objections to receiving "potential saboteurs and spies" were raised by officials of interior western states where evacuees resettled. Movement was slow, since many evacuees had trouble selling homes and businesses and finding new housing and means of livelihood. It was soon determined that relocation should be mandatory.

To that end, President Roosevelt issued Executive Order 9102, 7 Fed. Reg. 2165 (Mar. 20, 1942), which established the War Relocation Authority (WRA) and authorized it "to provide for the removal from designated areas of persons whose removal is necessary in the interest of national security. . . . " Under the new evacuation plan, the Army

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[7] Congress ratified the President's action one month later by enacting Pub. L. No. 503, 56 Stat. 173 (codified at 18 U.S.C. § 97a (1946)). That statute authorized the arrest, fine, and imprisonment of anyone violating an order issued pursuant to Executive Order 9066. *See Hirabayashi v. United States*, 320 U.S. 81, 91 (1943).

was to remove the Japanese Americans from designated military areas to temporary assembly centers, where they would be assigned to permanent camps run by the WRA. The relocation began near Seattle on March 24. By August 7, some 108 Civilian Exclusion Orders had been issued, resulting in the evacuation of about 92,000 people to assembly centers, where they remained for an average of about 100 days before moving to relocation camps. Some 70 percent were citizens of the United States.

Evacuees were given as little as forty-eight hours notice of an impending evacuation. According to the exclusion orders, government-run "Civil Control Stations" were to "provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc." In addition, the government stated that it would provide for storage at the owner's risk of substantial household items and other belongings packed in crates. *See, e.g.*, Civil Exclusion Order No. 5 (Apr. 1, 1942) (Complaint, Exhibit I).

There were sixteen assembly centers, all but three in California. Generally, assembly centers were organized around "blocks," a group of living units housing 600 to 800 people. Each block had showers, lavatories, toilets, and in most cases its own mess hall. The camps themselves were surrounded by fences and search lights and secured by military and internal police.

The transfer of evacuees from assembly centers to permanent relocation camps began in May 1942; by its completion, the WRA would have some 120,000 individuals in its custody. There were ten camps, built on federal land in Utah, Arizona, Colorado, Wyoming, Arkansas, Idaho, and California. Several of the sites were located in arid desert land, and most suffered from severe weather conditions at some time during the year. The camps were

surrounded by barbed wire, watchtowers, and armed guards. Living accommodations were arranged in the block style. Typically, one block contained twelve to fourteen barracks, a mess hall, baths, showers, toilets, a laundry and a recreation hall. Each barrack has 2000 to 2400 square feet of floor space and was divided into four to six rooms. One room would house a family, sometimes two. Employment outside the centers was not permitted; work was made available at the centers for $12 to $19 a month. Food, shelter, medical care, and education were provided to the evacuees free of charge, but even when their value was added to the low salaries, the economic hardship imposed by the internment was obvious.

Initially, no evacuee was allowed to leave the center except in emergencies, and then only in the company of a non-Japanese escort. Soon exceptions were made for evacuees to continue their college educations in the interior and to provide farm labor. By October, 1942, a formal leave system had been instituted that allowed short-term leave, work group leave for seasonal employment, and indefinite leave—the equivalent of relocation—for educational, employment, or other reasons. The next year, government officials adopted a more sweeping release plan in order to enlist Japanese Americans as soldiers. In February 1943, a "loyalty" questionnaire was administered to all evacuees over seventeen years of age. The information provided by these questionnaires was used to determine eligibility for enlistment and for leave and relocation outside the camps.

As the leave and relocation plans went into effect, the government moved to isolate evacuees who were viewed as security risks. The relocation center in Tule Lake, California, was designated to receive persons who "by their acts have indicated that their loyalties lie with Japan during the present hostilities or that their loyalties do not lie with the United States." *Personal Justice Denied* at 208 (quoting WRA Administrative Instruction No. 100 (July

15, 1943); WRA Administrative Manual § 110.1 (Oct. 6, 1943)). This included individuals who had applied for expatriation or repatriation to Japan, those who did not answer yes to the loyalty questionnaire, or those who were suspect for other reasons. Security measures around the camp were reinforced, including the addition of six tanks. Facilities were overcrowded, and numerous disturbances broke out. *Personal Justice Denied* at 209.

The implementation of the loyalty review and release program prompted a heated debate between the War Department and the Western Defense Command over continued exclusion of Japanese Americans from the West Coast. General DeWitt took the position that loyal Japanese Americans could not be separated from disloyal, so that all should be excluded; he argued in addition that public opinion would not support such a reversal in policy. Officials in the War Department urged that the loyal could be distinguished from the disloyal. After Pearl Harbor, there had been insufficient time to do so. But now that loyalty could be established on an individual basis through the loyalty questionnaire, they opposed continuing the exclusion.

The first significant breach in the policy of exclusion occurred in April 1943, when Japanese Americans in the armed forces were allowed to return to the West Coast on furlough. By Spring of 1944, efforts to end exclusion had gained momentum. In February, the WRA had been placed within the Interior Department, which opposed the evacuation. On May 26, 1944, Secretary of War Stimson proposed at a cabinet meeting that exclusion be ended. General Bonesteel, the new Commanding General of the Western Defense Command,[8] wrote to a War Department official on July 3, 1944, to state that there was no longer a military necessity for exclusion. The Navy concurred in

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[8] General DeWitt left the Western Defense Command in Fall 1943.

that judgment in September. In fact, Bonesteel began on a small scale to allow Japanese Americans to return to the West Coast during the Spring of 1944.[9] President Roosevelt declined to do anything "drastic or sudden," however. In the opinion of the Commission on Wartime Relocation, Roosevelt did not wish to impair his reelection chances in the West. *Personal Justice Denied* at 229.

The decision to lift the West Coast exclusion was made in a cabinet meeting on November 10, 1944, immediately following the election. The War Department publicly rescinded the mass exclusion order on December 17, 1944, although individual exclusions were continued in effect. The repatriation was slow; by August, 1945, when Japan surrendered, over half of the evacuated population remained in the United States' custody. Even though all individual exclusion orders and military restrictions against the Japanese were revoked on September 4, the last relocation camp was not closed until March 1946.

B.

The claims of military necessity that underlay the promulgation of Executive Order 9066 and its subsequent implementation are stated in two official reports filed by General DeWitt during the war: the *Final Recommendation of the Commanding General, Western Defense Command and Fourth Army, Submitted to The Secretary of War* and *Final Report: Japanese Evacuation from the West Coast 1942*. The *Final Recommendation*, submitted on February 14, 1942, stated that Japanese naval attacks on shipping and coastal cities were "probable," as were air raids and sabotage of vital installations within the Western Defense Command. It claimed that these enemy activities

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[9] Those permitted to return included individuals who had brought suit challenging their exclusion. It is alleged that these individuals were readmitted to moot their challenges. *See Personal Justice Denied* at 231-32.

would be assisted by agents in the United States. The 112,000 individuals of Japanese ancestry living in the area were "potential enemies" because of their ties to Japan and were "at large today." DeWitt wrote

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents. That Japan is allied with Germany and Italy in this struggle is no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes.

DeWitt claimed, without elaboration, that "indications" existed that these individuals were organized for concerted activity; "[t]he very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

DeWitt attempted to substantiate these claims in his *Final Report*.[10] Citing the United States' deteriorating military position in the Pacific theater, three isolated attacks on West Coast targets, and interference with Pacific shipping, DeWitt concluded that the West Coast was exposed to attack. DeWitt predicted that such an attack, if it came, would receive significant support from segments of the

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[10] The *Final Report* was dated June 5, 1943, but was not published until 1944.

Japanese American population. To support this claim, he pointed to FBI raids on the premises of Japanese aliens immediately following Pearl Harbor which discovered ammunition, rifles, shotguns, and "maps of all kinds." *Final Report* at 8. He claimed there were hundred of reports each night of signal lights visible from the coast and of unidentified radio transmissions. He noted that Japanese Americans, "by design or accident," had located many of their communities near vital installations. *Id.* at 9. And he repeated his racial arguments. The Japanese Americans, according to DeWitt, were

> a large, unassimilated, tightly-knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion . . . .

Id. at vii.[11] DeWitt claimed that hundred of Japanese American organizations on the West Coast were actively advancing Japanese war aims and that thousands of American-born Japanese had been educated in Japan, where they were indoctrinated and became "rabidly pro-Japanese." *Id.* DeWitt contended that it was impossible to isolate these disloyal Japanese Americans from the loyal.

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[11] Even though the West Coast population included second and third generations of Japanese immigrants, DeWitt argued that the ties to Japan were undiluted. He expressed his opinions more explicitly before a House Committee on April 13, 1943, when he said:

> I don't want any of them [the Japanese] here [on the West Coast]. They are a dangerous element. There is no way to determine their loyalty.

Personal Justice Denied at 221. The next day, in an off-the-record news conference that found its way into print, DeWitt stated that

> As I told the War Department, the Japanese Government finding out we are bringing these men in, it is the ideal place to infiltrate men in uniform . . . . [A] Jap is a Jap.

Id. at 222.

Therefore, it was necessary to remove them all from the West Coast.

Dewitt's *Final Recommendation* and *Final Report* have been challenged for inaccuracy as well as racial animus. DeWitt's intelligence apparatus during the early part of the war was criticized for giving credence to every rumor. Major General Joseph W. Stilwell, who served under DeWitt in December 1941, stated that in the San Francisco headquarters of the Western Defense Command "Common sense is thrown to the winds and any absurdity is believed." *Personal Justice Denied* at 64. DeWitt's security concerns were contradicted by several other individuals and organizations doing intelligence work on the West Coast. In November 1941, President Roosevelt and the War Department received a report from Curtis B. Munson, a Chicago businessman, who advised that "There is no Japanese 'problem' on the Coast. There will be no armed uprising of Japanese." C. Munson, *Japanese on the West Coast* (Complaint, Exhibit C). Munson thought it likely that covert agents would be "imported" from Japan and would not come from the local Japanese, who are "loyal to the United States or, at worst, hope that by remaining quiet they can avoid concentration camps or irresponsible mobs." He noted that potential sabotage suspects were already under surveillance. Due to a lack of strategic planning by the United States, however, Munson was unwilling to conclude that there was no danger from the Japanese living in the United States.

Munson's report was impressionistic; a detailed, complete analysis of the Japanese situation on the West Coasts was submitted to the Chief of Naval Operations on January 26, 1942, by Lieutenant Commander Kenneth D. Ringle, an expert on Japanese intelligence in the Office of Naval Intelligence. *See* K. Ringle, *Report on Japanese Question* (Complaint, Exhibit D). Ringle concluded that at least 75 percent of the American-born United States citizens of Japanese ancestry were loyal to the United States and

that a large majority of the alien residents were at least "passively loyal." He identified those groups most suspected of disloyalty and estimated their number as a small fraction of the Japanese American population. He noted that the most dangerous of these individuals were already in custody and that most of the others were known to the FBI and other government organizations. He recommended immediate detention for the remainder of the dangerous element, both citizens and aliens. He urged, however, that the so-called "Japanese Problem" could be handled on an individual, not racial, basis. "[I]n short," he concluded, "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people; . . . it is no more serious than the problems of the German, Italian, and Communistic portions of the United States population. . . ." *Id.* at 3.

DeWitt's *Final Report* cited numerous reports of unauthorized radio and light signals on the West coast as evidence of the need for evacuation. Those claims were directly contradicted by reports DeWitt received from the Federal Communications Commission (FCC), which monitored transmissions on the West Coast and provided its findings on a continuous basis to DeWitt. According to an April 1944 letter from FCC Chairman James L. Fly to the Attorney General, the FCC's Radio Intelligence Division conducted a 24-hour surveillance of the entire radio spectrum from December 1941 to July 1, 1942. At the request of DeWitt, the Commission supplemented its sophisticated surveillance apparatus with mobile direction-finding intercept units to pick up ship-to-shore transmissions; upon investigation, no transmission was ever found to be "other than legitimate." DeWitt's *Final Report* claimed that reports of radio and light signaling were virtually eliminated after the evacuation. The FCC found that the number of reports was not affected by the evacuation. Finally, DeWitt had asserted in a memorandum to the

Assistant to the Attorney General that he did not have the capacity to track down suspected transmitters to an area smaller than a city block. The FCC in fact had the capacity to pinpoint a transmitter to a particular room within a building. Letter from FCC Chairman James L. Fly to Attorney General Francis Biddle (Apr. 4, 1944) (Complaint, Exhibit E).

Federal Bureau of Investigation Director J. Edgar Hoover also denied that illicit shore-to-ship signaling had occurred early in the war. In a letter to the Attorney General dated February 7, 1944, Hoover said that every complaint of illicit signaling had been investigated and had revealed nothing. Hoover also said that there was no information that could link espionage activity ashore to Japanese attacks on ships leaving West Coast ports. M. Grodzins, *Americans Betrayed* 291 (1949).

C.

Numerous aspects of the exclusion and internment program were challenged in civil and criminal proceedings during the war.[12] Several of those cases reached the Supreme Court, where the constitutionality of the government's treatment of Japanese Americans was tested. In *Hirabayashi v. United States*, 320 U.S. 81 (1943), the court considered whether the imposition of curfew regulations on Japanese Americans was a legitimate exercise of the constitutional power to wage war.[13] In *Korematsu v. United States*, 323 U.S. 214 (1944), the same issue was raised

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[12] A partial listing of cases involving legal claims or defenses raised by Japanese Americans is given in Plaintiffs' Supplemental Memorandum on the Statute of Limitations (Jan. 20, 1984) (Exhibit A).

[13] A companion case, *Yasui v. United States*, 320 U.S. 115 (1943), was decided at the same time.

with respect to the decision to exclude Japanese Americans from the West Coast.[14]

The information gathered by the FBI, the FCC, and Naval Intelligence which minimized General DeWitt's theory of a mass threat gradually came to the Justice Department's attention as it prepared to defend these cases before the Supreme Court. Once in possession of these facts, Department officials disagreed among themselves about whether disclosure was required. That issue was initially raised by Edward Ennis, Director of the Justice Department's Alien Enemy Control Unit, during preparation of the *Hirabayashi* brief. Ennis, who had learned of Lieutenant Ringle's intelligence work,[15] summarized Ringle's conclusions about the "Japanese Problem" in a memorandum to the Solicitor General. *See* Memorandum from Ennis to Solicitor General Charles Fahy (Apr. 30, 1943) (Complaint, Exhibit J). Ennis then noted that the government planned to argue in *Hirabayashi* that mass evacuation was required because individual, selective evacuation would have been "impractical and insufficient." But, he pointed out, this argument was significantly undercut by the fact that "the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary." Memorandum at 3. Ennis suggested that the Department had a duty to disclose the report to the Court. "[A]ny other course of conduct might approximate the suppression of evidence." *Id.* at 4.

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[14] In a third case, *Ex parte Endo*, 323 U.S. 283 (1944), the Court held that the WRA had no statutory authority to continue to detain concededly loyal citizens. The consitutional issue was not reached. A lengthy treatment of the legal strategies in these wartime cases can be found in P. Irons, *Justice at War* (1983).

[15] Ennis stated that he first learned of Ringle's views from an article by "An Intelligence Officer" in the October 1942 issue of Harper's Magazine. Ennis subsequently procured a copy of a report that Ringle had prepared for the WRA based upon Ringle's earlier intelligence work. Ennis Memorandum at 1.

Despite Ennis' memorandum, the *Hirabayashi* brief did not mention Ringle's conclusions.[16] The government instead argued that its actions were reasonable based on the gravity of the military situation following Pearl Harbor, the danger of an attack on the West Coast, the potential for sabotage by an unknown number of disloyal Japanese Americans, and the inability to determine loyalty on short notice. As evidence of these conclusions, the government cited the historic animus toward the Japanese on the West Coast, the substantial portion of the Japanese American population comprised of aliens, the prevalence of dual citizenship among Japanese Americans, their practice of Shintoism, which includes among its beliefs the divinity of the Japanese emperor, the large number of American-born children of Japanese parents who were educated in Japan or in Japanese language schools on the West Coast, and the links between West Coast Japanese organizations and Japan. The government drew this evidence from facts—found in congressional hearings, newspaper reports, and general articles and books—that "embrace the general military, political, economic, and social conditions under which the challenged orders were issued. These historical facts . . . are of the type that are traditionally susceptible of judicial notice in considering constitutional questions. . . ." Brief for the United States at 11, *Hirabayashi* (footnote omitted).[17]

The question of disclosure arose again in 1944 with the preparation of brief for *Korematsu v. United States.* By this time, DeWitt's *Final Report* had been published.[18]

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[16] The Harper's Magazine article was cited only for the proposition that Japanese Americans educated in Japan would probably be intensely loyal to that country. Brief for the United States at 29 & n.46, *Hirabayashi.*

[17] The brief did not cite DeWitt's *Final Recommendation* as a source of its facts.

[18] In 1942, an excerpt from the *Final Report* was shown to Ennis,

Also, by this time, the Attorney General had in his possession the letters from FCC Chairman Fly and FBI Director Hoover contradicting the *Report's* security concerns. *See* Letter from FCC Chairman Fly to Attorney General Biddle (Apr. 4, 1944) (Complaint, Exhibit E); Memorandum from John L. Burling to Attorney General Biddle (Apr. 12, 1944) (Complaint, Exhibit K). Prompted by these letters, two Justice Department officials working on the *Korematsu* brief—Ennis and Burling—pushed for the Department to disavow the *Final Report.* Memorandum from Ennis to Assistant Attorney General Herbert Wechsler (Sept. 30, 1944)(Complaint, Exhibit L). Burling wrote a footnote, initially included within a draft of the brief, that stated:

> The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944) is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report.

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who objected to misstatements of fact within it. Prior to its official publication, copies were made available to the states of California, Oregon, and Washington for use in an *amici curiae* brief in *Hirabayashi*; advance copies were not given to the Justice Department, however. *See* Memorandum from Ennis to Assistant Attorney General Herbert Wechsler at 3 (Sept. 30, 1944) (Complaint, Exhibit L).

Memorandum of Burling to Asistant Attorney General Wechsler (Sept. 11, 1944) (quoted in *Korematsu v. United States*, No. 27635-W, slip op. at 21 (N.D. Cal. Apr. 18, 1944)). Ennis urged the footnote's preservation against War Department objections on several grounds, including the Justice Department's ethical obligation to the Supreme Court not to cite inaccurate material as a source of which the Court might take judicial notice. Ennis Memorandum at 1.

Instead, after negotiation with the War Department, the Justice Department substituted a different footnote, which was less offensive to the War Department and more ambiguous as to the accuracy of the *Final Report*. The new footnote stated that

> The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944), hereinafter cited as *Final Report*, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

Brief for the United States at 11 n.2, *Korematsu*. In place of the *Final Report*, the brief based its military necessity argument on the facts and authorities cited in the *Hirabayashi* brief. The brief added to these authorities Ringle's anonymous Harper's Magazine article. *Id.* at 12. n.3. The brief did not discuss the article's contents.

With these representations before it, the Court upheld both the curfew in *Hirabayashi* and the evacuation in *Korematsu* as legitimate exercises of the constitutional power to wage war. Findings of military necessity were central

to both of these holdings. As the Court stated in *Korematsu*:

> Here, as in the *Hirabayashi* case, *supra*, at page 99, ". . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

323 U.S. at 218.

II.

Plaintiffs' complaint alleges the foregoing facts and, for relief, asks that the United States be required to pay compensation for various injuries caused to them by the internment. The United States defends by a plea of sovereign immunity and emphasizes that it is subject to suit for monetary damages only in those situations where it has consented to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Plaintiffs cite a number of statutes which they claim act to waive sovereign immunity: the Tucker Act, the Federal Tort Claims Act, the civil rights statutes, the general federal jurisdiction statute, and the Administrative Procedure Act. These statutes will be considered in that order. Where plaintiffs have established a waiver of sovereign immunity, the United States' other defenses—the running of the statutes of limitation and the exclusivity of the American-Japanese Evacuation Claims Act—will be considered.

A.

The Tucker Act grants federal court jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491.[19] That language has been held to constitute consent by the federal government to suit for monetary damages. *United States v. Mitchell*, 103 S.Ct. 2961, 2967 (1983). It does not, however, create a substantive right to damages. Rather, the substantive right must be found in some other source of law, such as the Constitution, an Act of Congress, or an executive regulation. Not every constitutional provision, statute, or regulation provides a basis for an award of monetary damages against the federal government. To succeed, the plaintiff must show that the source of substantive law "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Id.* at 2968 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)); *see also Kizas v. Webster*, 707 F.2d 524, 537 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984). Such a source of substantive law need not itself contain a waiver of sovereign immunity; the Tucker Act suffices for that purpose. *Mitchell*, 103 S.Ct. at 2968.

Fourteen of plaintiffs' claims are based on alleged violations by the federal government of plaintiffs' constitutional rights. Plaintiffs contend that they were subjected to loss of life, liberty, and property without probable cause, notice of charges against them, or hearings in violation of their Fifth Amendment due process rights (Count I); that

[19] Section 1491 grants jurisdiction over these cases to the United States Claims Court. The district courts are given concurrent jurisdiction by 28 U.S.C. § 1346(a)(2) for claims not exceeding $10,000. Plaintiffs seek only $10,000 for each nontort claim and therefore fall within § 1346(a)(2).

they were subjected to invidious discrimination based on race and national origin in violation of their Fifth Amendment equal protection rights and of the privileges and immunities clause (Counts II, V); that their property was taken without just compensation in violation of the Fifth Amendment takings clause (Count III); that they were subject to arrest and search without probable cause or warrant in violation of the Fourth Amendment (Count IV); that they were denied fair trial and representation by counsel in violation of the Sixth Amendment (Count VI); that they were subjected to cruel and unusual punishment in violation of the Eighth Amendment (Count VII); that they were deprived of their First and Ninth Amendment rights of freedom of speech, petition, assembly, religion, travel, and privacy (Counts VIII-XII); that they were subjected to forced labor without compensation in violation of the Thirteenth Amendment (Count XIII); that they were the subject of bills of attainder and *ex post facto* laws in violation of Article I, section 9 (Count XIV); and that they were denied their right of *habeas corpus* pursuant to Article I, section 9 (Count XV).

Only one of the constitutional provisions on which plaintiffs rely can fairly be interpreted to mandate compensation: the Fifth Amendment "takings" clause. The Fifth Amendment due process clause does not support a monetary claim against the federal government because "[t]he Due Process Clause simply cannot be read to mandate money damages be paid." *Radin v. United States*, 699 F.2d 681,685 n.8 (4th Cir. 1983) (quoting *Alabama Hospital Ass'n v. United States*, 656 F.2d 606, 609 (Ct. Cl. 1981)). Nor does the equal protection clause of the Fifth Amendment mandate compensation. *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980) (equal protection clause "do[es] not obligate the Federal Government to pay money damages"). The other constitutional provisions are equally inhospitable to plaintiffs' monetary claims.

Plaintiffs urge the Court to follow either of two paths around this jurisdictional roadblock. First, they argue that the government should be equitably estopped from raising a sovereign immunity defense because of its alleged misconduct in misrepresenting and suppressing evidence before the courts and manipulating judicial processes. However, it is well established that subject matter jurisdiction cannot be created by the actions of the parties; in particular, principles of estoppel do not apply. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

Plaintiffs alternatively urge that the rule of liability articulated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), be extended against the federal government. In *Bivens*, the Supreme Court recognized the right of a private plaintiff to seek damages against a federal agent who, while acting under color of his authority, violated the plaintiff's Fourth Amendment rights. *See also Carlson v. Green*, 446 U.S. 14 (1980) (recognizing *Bivens* claim based on Eighth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (recognizing *Bivens* claim based on Fifth Amendment due process clause). Plaintiffs argue that a Bivens action should lie not only against an individual federal employee but also against the United States itself. Plaintiffs point to principles underlying the Court's action in *Bivens*—the historic availability of damages to remedy invasions of personal interests in liberty and the absence of other effective judicial remedies—as support for their position. *Cf.* Note, Rethinking Sovereign Immunity After Bivens, 57 N.Y.U. L. Rev. 597 (1982). However, *Bivens* also cautions that a court should refrain from creating a cause of action where "special factors counsel[] hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 196. Congress' interest in maintaining control over the public fisc is such a special factor. Thus, there being no affirmative action by Congress in this context, the doctrine of

sovereign immunity stands as a bar to the holding that plaintiffs seek. *See Duarte v. United States*, 532 F.2d 850, 852 (2d Cir. 1976) (refusing to recognize *Bivens* action against United States).

Only the takings claim remains of the plaintiffs' causes of action based on the Constitution. The takings clause forbids that "private property be taken for public use, without just compensation." *U.S. Const.* amend. V. That guarantee is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Plaintiffs' claim is in essence an inverse condemnation proceeding, in which a citizen is deprived of property by the government and then must initiate judicial action to obtain just compensation. This Court has jurisdiction over such suits under the Tucker Act. *United States v. Dow*, 357 U.S. 17, 21 (1958); *United States v. Dickinson*, 331 U.S. 745, 747-48 (1947).

Plaintiffs' alleged property losses fall into three categories. The first category includes property confiscated by federal authorities: cameras, radios, vehicles, bank deposit assets, crops, and business property. The second category encompasses property lost as a result of the government's exclusion of plaintiffs from homes and businesses on the West Coast. The third consists of "vested constitutional rights" lost as a result of the evacuation and internment. Plaintiffs' Opposition to Motion to Dismiss at 14-16 (July 15, 1983).

The claim that the government "took" constitutional rights can be quickly dismissed. The Supreme Court has defined property for taking purposes as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corps.*, 323 U.S. 373, 378 (1945). Contract rights are also a form of property that

may be taken. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). The various consitutional rights asserted by plaintiffs, however, do not fall within any category of "property" recognized for takings purposes. The cases cited by plaintiffs, *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Board of Regents v. Roth*, 408 U.S. 564 (1972), define property rights for the purpose of due process but have no applicability to takings doctrine. *See Kizas v. Webster*, 707 F.2d 524, 539 (D.C. Cir. 1983), *cert denied*, 104 S.Ct. 709 (1984).

Plaintiffs' other claims fit within the takings clause's definition of property. There is no "set formula," however, for determining whether their property was "taken." Rather, a court must engage in "essentially ad hoc, factual inquiries," and its ruling will depend largely "upon the particular circumstances [in that] case." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). A number of factors guide this determination. One is the character of the governmental action; a taking may more readily be found when there is an actual physical invasion of the property than when the interference took the form of a public program. Still, physical invasion is not essential; a statute that substantially furthers important public policies may still so frustrate distinct investment-backed expections [*sic*] as to amount to a taking. *See id.* at 123-28 (reviewing taking cases); *Foster v. United States*, 607 F.2d 943 (Ct. Cl. 1979) (taking occurred when owners of reserved mineral interest in land they gave to government were denied access to property for mining purposes.)

Defendant suggests that there is no takings claim here because the government's actions were based on a perceived need to protect the national security. During times of imminent peril, the government is empowered to destroy an individual's property without compensation where that action might result in saving the lives and property of many. *See United States v. Caltex*, 344 U.S. 149 (1952);

United States v. Pacific Railroad Co., 120 U.S. 227 (1887). Common examples of this authority would be the demolition of neighboring structures to fight a city fire, or, of more relevance to this case, the destruction of bridges or refineries to impede the advance of enemy forces. The sovereign is not free to take any property without compensation that may be needed for the war effort; the element of imminent peril is required.[20]

The issues posed by plaintiffs' takings claim therefore, are whether a taking occurred and whether the taking, if any, was the product of action neccessitated by immediate peril. Plaintiffs, of course, allege that there was no military necessity for the evacuation and internment and that those in charge were aware of that fact. Considering plaintiffs' allegations of fact in the most favorable light, as required with a motion to dismiss, the Court must conclude that plaintiffs have stated a takings claim.

B.

Yet that conclusion does not end the inquiry. The government contends that this Court does not have jurisdiction to hear the takings claim, or, in fact, any of plaintiffs' claims, because Congress intended that the reimbursement mechanism created by the American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981-1987, should be the exclusive remedy for monetary claims of those affected by the evacuation program.[21]

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[20] The cases cited by defendant to support its "national security" argument are inapposite here. Both *National Board of Young Men's Christian Associations v. United States*, 395 U.S. 85 (1969), and *Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 683 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974), concern takings claims based on destruction that occurred in efforts to protect the property at issue.

[21] Plaintiffs cite the Evaucation Claims Act as a jurisdictional basis for their suit. Complaint ¶ 8. All claims under the Act were required to be filed by January 3, 1950. 50 U.S.C. App. § 1982(a). Plaintiffs' claims, therefore, would fall outside the terms of the Act.

The Act was passed in 1948 for the purpose of adjudicating "claims of persons of Japanese ancestry against the United States for losses arising out of their forced evacuation from the west coast, Alaska, and Hawaii during World War II." H.R. Rep. No. 732, 80th Cong., 2d Sess., *reprinted in* 1948 *U.S. Code Cong. & Ad. News* 2297, 2297. Under the statute, which was amended in 1951 and 1956, the Attorney General was empowered to settle claims for up to $100,000 for damage to or loss of real or personal property that was a "reasonable and natural consequence" of the evacuation. 50 U.S.C. App. §§ 1981(a), 1984(a). If a compromise could not be reached, the Court of Claims had jurisdiction to determine the claim. *Id.* § 1984(b). Not compensable under the Act were losses resulting from death or personal injury, personal inconvenience, physical hardship, or mental suffering; loss of anticipated profits or earnings; loss of property vested in the United States pursuant to the Trading With the Enemy Act; and losses arising from certain statutory actions of government agencies. The Act also excluded claims by individuals deported to Japan or who were not actually residing in the United States on December 7, 1941. *Id.* § 1982(b). The Act set a deadline of January 3, 1950, for the presentation of claims. *Id.* § 1982(a). The payment of an award under the Act was "final and conclusive for all purposes, notwithstanding any other provision of law to the contrary" and was a "full discharge of the United States . . . with respect to all claims arising out of the same subject matter." *Id.* § 1984(d). Over 26,000 claims were filed; approximately $37 million was distributed by the government. *Personal Justice Denied* at 118.

Defendant argues that the Act is a comprehensive system which Congress designed with claims similar to plaintiffs' in mind. Therefore, defendant asserts, the Court does not have subject matter jurisdiction over plaintiffs' claims; Congress placed that jurisdiction solely in the hands of the Attorney General and the Court of Claims.

Defendant reads too much into the Act. The intent of Congress, as expressed by the language of the statute, was to compensate "for damage to or loss of real and personal property," *id.* § 1981; the statute carefully excludes claims that are not directly related thereto. It may be true, as defendant states, that the Attorney General and the Court of Claims took a broad approach to defining compensable claims. But that is not evidence of Congress' intent. The Act does not bar this Court from jurisdiction over all of plaintiffs' claims.

Whether the Act was intended to be the sole remedy for claims of property loss is a more difficult question. Here, the Supreme Court's teachings in *Brown v. General Services Administration*, 425 U.S. 820 (1976), are instructive. The question in *Brown* was whether Congress intended Title VII of the Civil Rights Act of 1964 to be the exclusive remedy for a federal employee complaining of job-related discrimination. Congress failed to state the answer explicitly, so the Court looked to other evidence of Congress' intent. First, it noted that at the time Congress extended Title VII to federal workers, Congress believed, rightly or wrongly, that federal employees had no other remedy to fight employment discrimination. The Court found in that perception an indication of intent to create an exclusive remedy. In addition, the Court found that the "structure" of the Act was indicative of exclusivity: "the balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief." *Id.* at 832. It has often been held that a precisely drawn, detailed statute preempts more general remedies.

Here, there is a detailed statute, finely tuned by amendment, and enacted by a Congress that may have believed that no other remedy was available to those who had been evacuated. *See* H.R. Rep. No. 732, 80th Cong., 2d Sess., *reprinted in* 1948 *U.S. Code Cong. & Ad. News*, 2297, 2299.

("The only clear recourse which the evacuees now have, through the passage of private relief bills, is totally impracticable.") (Letter from Interior Secretary J.A. Krug to House Speaker Joseph W. Martin, Jr.) Yet the system Congress created, while detailed, is not complete; it does not reimburse individuals for all property claims for which they might recover under the takings clause. For example, there has been no showing here that claimants were paid for the value of the use of property denied to them during the period of their internment. But such lost value is recoverable when a "temporary" taking occurs. *Compare* 50 U.S.C. App. § 1981 *with Kimball Laundry Co. v. United States*, 338 U.S. 1, 7 (1949). Nor were claimants paid for interest that accrued between the time of their loss and the time of payment. Yet interest is also recoverable under the takings clause. *Compare Claim of George M. Kawaguchi*, 1 *Adjudications of the Attorney General* 14, 19-20 (1956), *with Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299, 306 (1923). To bar constitutional claims from the courts is an extraordinary step which courts are not willing to take absent a clear and convincing expression of congressional intent. *See Johnson v. Robison*, 415 U.S. 361, 366-67 (1974).

The question of exclusivity need not be reached here, however, because another defense raised by the government—the running of the statute of limitations—requires dimissal of the takings claim. The lifespan of plaintiffs' takings claim is controlled by 28 U.S.C. § 2401(a), which states that, except where specifically provided elsewhere,

> every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The Court has no jurisdiction to consider claims that fall outside the six-year period. *Japanese War Notes Claimants Association of the Philippines, Inc. v. United States*, 373

F.2d 356, 358 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967); *see also Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981).

The length of a statute of limitations is a product of a legislative weighing of competing claims of fairness—the need of plaintiffs for a reasonable amount of time within which to present their claims, and the right of defendants to be free of stale claims. Statutes of limitation also protect both the Court and the defendant from cases where the loss of evidence—by death or disappearance of witnesses, fading memories, or disappearance of documents—may frustrate the search for truth. *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

This suit was filed on March 16, 1983. A right of action normally accrues at the time the underlying incident occurred, and that in essence is the rule defendant wants applied here. The alleged taking of property occurred during World War II; under defendant's theory, the six-year period would have begun to run then and would have expired well before this suit was filed.

Plaintiffs assert, however, that defendant fraudulently concealed information essential to their cause of action. They claim that this information was not revealed until the publication in December 1982 of *Personal Justice Denied*, the report of the Commission on Wartime Relocation and Internment of Civilians. Plaintiffs argue that the running of the statute was tolled until that date, so that their suit would fall well within the six-year period.[22]

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[22] In addition, plaintiffs argue that the United States is equitably estopped from raising a statute of limitations defense because of its fraudulent concealment. The statute of limitations is a condition that Congress has placed on the United States' consent to suit. As such, it is a jurisdictional requirement that cannot be waived or subject to estoppel. *Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981); *see also Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (subject matter jurisdiction cannot be established by estoppel).

Plaintiffs' argument relies heavily on this Circuit's decision in *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). The plaintiff Richards was a career employee with the United States Information Agency who resigned under duress in 1955. He brought suit 24 years later, complaining that defendants, six former federal officials, had knowingly and maliciously used false information to obtain his resignation. Defendants did not tell plaintiff in 1955 that they had concocted the charges that led to his resignation; plaintiff did not discover that fact until 1978, when a request under the Freedom of Information Act produced documents revealing defendants' culpability. Defendants' motion to dismiss on statute of limitations grounds was granted. The Court of Appeals reversed, holding that where a defendant conceals facts giving rise to the plaintiff's claim—here that defendants had made false accusations against plaintiff—the statute is tolled until the plaintiff, employing due diligence, could have discovered the facts that were fraudelently concealed. *Id.* at 69-70.[23]

Plaintiffs do not argue that they were unaware during the war that they had lost their property or that the loss resulted from the government's program of evacuation and internment. Rather, they claim that had they brought suit when the property was lost, the suit would have foundered upon the government's defense that evacuation and internment were required by military necessity. Indeed, plaintiffs argue that the Supreme Court's "finding" of military necessity in *Korematsu* practically precluded any future challenge to the government's actions. The issue, therefore, under plaintiffs' theory of the case, is this: at what time were sufficient facts generally known about the evacuation and internment so that plaintiffs, using due

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[23] Where there are continuing acts of concealment, plaintiffs urge adoption of a rule that accrual occurs, not when plaintiffs should have discovered their cause of action but, when they actually discovered it. *See Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975). Due diligence, not actual discovery, is the law of this Circuit, however.

diligence, could have conscientiously challenged the military necessity finding.[24] Plaintiffs maintain that sufficient information was not available until 1982 when the Commission pulled together the facts which allegedly impeach that finding.

The government urges adoption of a theory of accrual much narrower than the holding in *Richards*. It claims that *Richards* involved individual defendants, and that its fraudulent concealment holding does not necessarily apply to the United States. Instead, defendant argues, the most liberal tolling doctrine applicable to the United States is that set out in *United States v. Kubrick*, 444 U.S. 111 (1979). In *Kubrick*, a medical malpractice suit brought under the Federal Tort Claims Act, the Supreme Court held that the Act's two-year statute of limitations begins to run once a plaintiff is aware of his injury and its cause. Awareness of his legal rights is not necessary. Defendant argues that the plaintiffs here knew of their injury—the property loss—and its cause when the injury occurred. Their cause of action therefore accrued then. Defendant contends that even if *Richards* should apply, there was no concealment of plaintiffs' "cause of action"; the concealment, if any, went to an affirmative defense and not to the takings claim.

Defendant is correct in stating that *Richards* involved individual defendants and not the federal government. But

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[24] It is helpful to view plaintiffs' argument in light of the recently revised Rule 11 of the Federal Rules of Civil Procedure. That rule states in part:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

the doctrine of fraudelent concealment has been applied to the United States by other courts, and nothing in *Kubrick* establishes that those holdings are wrong. *See Diminnie v. United States*, No. 81-1713, slip op. at 6 (6th Cir. Feb. 20, 1984); *Japanese War Notes Claimants Association of the Philippines, Inc. v. United States*, 373 F.2d 356, 358-59 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). Defendant is also correct in stating that the concealed facts in *Richards* went to an element of plaintiff's cause of action, while here, the concealed facts go to a defense. Yet is would not be appropriate to hinge the decision here on such a technical distinction.

It is undisputed that reports from the FCC, the FBI, and Naval Intelligence contradicting the claim of military necessity were concealed by defendant throughout the war, as most graphically illustrated by the Ennis and Burling memoranda urging the disclosure of these findings in the *Hirabayashi* and *Korematsu* briefs. Obviously, Ennis and Burling strongly believed that these documents could have affected the Supreme Court's decisions. Had this information been suppressed until the present, plaintiffs' tolling argument might succeed under *Richards*.

But, even if *Richards* is applied in this case, plaintiffs' claim is time barred. The FCC, FBI, and Naval Intelligence reports and others have been available, and publicized, since soon after the war's conclusion. The pre-war report from Curtis Munson to President Roosevelt, which advised, "There is no Japanese 'problem' on the Coast" was first disclosed in 1946 during hearings of the Joint Congressional Committee on the Investigation of the Pearl Harbor Attack. *Pearl Harbor Attack: Hearings Before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong., 1st Sess. 2680 (1946). Ringle's detailed report, which concluded that only limited individual detention of Japanese Americans was needed, was published at least as early as 1949 in Martin Grodzins' book, *Americans Be-*

trayed: Politics and the Japanese Evacuation 188-89.[25] Grodzin's book also reported the letter from FCC Chairman Fly to Attorney General Biddle describing Fly's surveillance reports to General DeWitt and revealing the inaccuracies of DeWitt's claims of illicit transmissions. *Id.* at 291-94. That book notes that FBI Director Hoover similarly denied the existence of unauthorized transmissions in a letter to Biddle. *Id.* at 291. Finally, Grodzin points out that all of this information was gathered by the Justice Department in preparation for the Supreme Court litigation. *Id.* at 291 n.50.

Grodzin's book is not alone; the events surrounding the evacuation and internment have been subjected to intense scrutiny over the years and have produced a lengthy literature.[26] These publications lay out almost all of the facts alleged by plaintiffs, along with many others. Plaintiffs cannot claim that the facts underlying their suit were dis-

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[25] As noted above, an abbreviated version of Ringle's report appeared in the October 1942 issue of Harper's Magazine. The article did not carry Ringle's name; the author was listed as an "Intelligence Officer" stationed on the West Coast who had studied that area's Japanese population. Reference was made to the article in the government's *Korematsu* brief; the brief did not describe the article's conclusions or elaborate on the authority's identity or expertise.

[26] An incomplete list of material, not including congressional hearings and archival material, published at least six years before this suit was filed would include *The Japanese in America, The Problem and Solution, Harper's Magazine*, Oct. 1942, at 489; U.S. Dept. of Interior, *The Evacuated People: A Quantitative Description* (1946); M. Grodzins, *Americans Betrayed* (1949); J. tenBroek, E. Barnhart & F. Matson, *Prejudice, War and the Constitution* (1954); A. Bosworth, *America's Concentration Camps* (1967); R. Daniels, *Concentration Camps USA: Japanese Americans and World War II* (1971); R. Daniels, *The Decision to Relocate the Japanese Americans* (1975); M. Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* (1976). The most recent works are Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982), and P. Irons, *Justice at War* (1983).

covered by the Commission on Wartime Relocation and Internment of Civilians. Its synthesis of the material has made it easier for plaintiffs to challenge the military necessity rationale of *Korematsu*. But the availability of the material to a diligent plaintiff did not require the Commission's intervention. A Supreme Court finding is a formidable obstacle. But diligent advocates have successfully challenged such decisions in the past. *Compare Brown v. Board of Education*, 347 U.S. 483 (1954), *with Plessy v. Ferguson*, 163 U.S. 537 (1896); *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), *with Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), *with United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Here, such a suit could have been filed long ago.

Still, plaintiffs point to several documents that were not released until the Commission's report was published in 1982 and that they claim are "essential" to the success of their challenge.

Two of these documents date from before the war: a memorandum from President Roosevelt to the Chief of Naval Operations, dated August 10, 1936 (Complaint, Exhibit B), and a memorandum from Secretary of the Navy Frank Knox to President Roosevelt, dated October 9, 1940 (Complaint, Exhibit A). These documents discuss the possibility of building "concentration camps" for Japanese Americans "in the event of trouble." Plaintiffs cite these as evidence that the conspiracy to deprive them of their constitutional rights began before the war. However, plaintiffs' suit is based not on the fact of internment but rather on internment without military necessity. These documents shed no new light on that, unless they corroborate military concerns contemporary to the internment decision.

Next, plaintiffs point to a letter from Colonel Karl Bendetsen, liaison between the War Department and the West-

ern Defense Command, to Lieutenant John Hall, Acting Executive Officer in the Assistant Secretary of War's office. (Complaint, Exhibit M). The letter, dated September 13, 1942, submits to Hall a draft of legislation designed to suspend the writ of habeas corpus as to persons of Japanese ancestry who had been excluded from any military area. Plaintiffs view this as further evidence of the conspiracy to deprive them of their rights and property. But while his goal may not have been admirable, Colonel Bendetsen's suggestion of the submission of this or any other bill for Congress' consideration is not actionable or evidence of anything relevant to plaintiffs' ability to make a timely claim.

The most significant of the newly released documents are the memoranda by Edward Ennis and John Burling discussing the inaccuracies in DeWitt's *Final Report* and urging that notice be taken of those inaccuracies in the *Hirabayashi* and *Korematsu* briefs. These memoranda show that some Justice Department officials believed that DeWitt's military necessity rationale was questionable but that their superiors decided nevertheless not to disclose to the Supreme Court probative evidence contradicting that rationale. Plaintiffs argue that these documents are essential to their claim because the

> documents previously available did *not* disclose the government's conspiracy or other evidence obviously different from that which had been presented to the courts in the 1940's. To the contrary, this published information merely tended to support the *same arguments* advanced against the government and rejected in the wartime cases—that the plaintiff class was loyal to the United States and there was no military necessity for the wartime actions. It was not until the [Commission's] work and related archival findings uncovered and published evidence of *intentional government concealment and misrepresentation,*

> that plaintiffs had evidence *obviously different* from that earlier ruled on by the Supreme Court. . . . The [Commission] report and related archival findings repudiate the government's wartime representations in its legal briefs and the foundations of the Supreme Court's wartime rulings. These documents finally provided plaintiffs the grounds for a good faith pleading that could successfully rebut the government's claims of "military necessity," and thus meet the requirements of Rule 11, Fed. R. Civ. P., and *stare decisis*.

Plaintiffs' Supplemental Memorandum on the Statute of Limitations at 7-9 (Jan. 20, 1984) (footnote omitted).

However, it is the Ringle, Fly, and Hoover documents, not the Ennis and Burling memoranda, which contain the direct evidence requisite to challenging the finding of military necessity.[27] The Ennis and Burling memoranda are not probative of military necessity, *vel non*. They fully justify the condemnation of the wartime Department of Justice voiced by the Commission and the plaintiffs. The failure of the Attorney General or the Solicitor General of the time to be more forthright with the Supreme Court was one basis for the decision of the District Court in the Northern District of California to vacate the conviction of Fred Korematsu. *See Korematsu v. United States*, No. 27635-W (N.D. Cal. Apr. 18, 1984).[28] But for purposes of

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[27] The briefs filed in *Korematsu* by appellant, the Japanese American Citizens League, and the American Civil Liberties Union all strongly attacked the finding of military necessity made by the Executive Branch. Those briefs, however, relied for factual assertions essentially upon newspaper reports and similar secondary sources.

[28] Fred Korematsu recently brought a petition for a writ of error *coram nobis* in the United States District Court for the Northern District of California to vacate his wartime conviction on the ground of governmental misconduct. The Court has granted that petition. *Korematsu v. United States*, No. 27635-W (N.D. Cal Nov. 14, 1983). In

the takings claim at issue here, the memoranda are directly probative only of the fact that the Department of Justice denied the Supreme Court timely access to the Ringle, Fly, and Hoover documents.[29] That concealment, whether intentional or not, is not a basis for tolling a statute of limitations beyond the time the information concealed by that conduct was published. The publication in the late 1940's of the previously concealed Ringle, Fly, and Hoover documents, not the publication in the 1980's of the Ennis and Burling memoranda, provided the basis on which plaintiffs could have filed a complaint challenging the military necessity finding and marked the beginning of the running of the statute of limitations.

This conclusion does not overlook plaintiffs' contention that the 1982 publication of the Ennis/Burling memoranda was the first disclosure of direct evidence of a vital overt act in an alleged conspiracy: "intentional government concealment" of the Ringle, Fly, and Hoover documents from

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reaching its decision, the Court held, *inter alia*, that the petition had been timely filed.

> It appears from the record that much of the evidence upon which petitioner bases his motion was not discovered until recently. In fact, until the discovery of the documents relating to the government's brief before the Supreme Court, there was no specific evidence of governmental misconduct available.

Id. slip op. at 25 (Apr. 18, 1984).

That holding does not affect the conclusions of this Court. The government did not oppose Korematsu's *coram nobis* petition, so that the issue of timeliness was not sharply defined there. In contrast, this case involves the government's sovereign immunity, and thus requires a searching investigation of timeliness. Furthermore, while the "specific evidence" of governmental misconduct has only recently been revealed, circumstantial evidence has long been available. Finally, evidence of the government's misconduct was not requisite to the filing of plaintiffs' claims here; other evidence rebutting the government's claim of military necessity was available.

[29] It is unclear whether the Department of Justice had the Munson report at the time it filed its briefs in *Korematsu*.

the Supreme Court by the Department of Justice at the behest of the military. *See* Plaintiffs' Supplemental Memorandum at 8. But there has long been sufficient circumstantial evidence of the concealment: the Department of Justice had these documents when it filed its brief in *Korematsu*, yet it is apparent from the face of the United States' brief that it did not mention those documents. *See supra* pp. 40-41. Moreover, proof of intentional concealment or of conspiracy cannot overcome the ultimate fact for limitations tolling purposes that the underlying documents concealed from the Supreme Court in 1944 became public and were available to diligent plaintiffs from the late 1940's onward. The statute of limitations has run long ago.

In summary, the standard by which fraudulent concealment must be judged is not one of full disclosure but rather one of sufficient disclosure to allow the plaintiffs, through due diligence, to state a claim. In other words,

> Once the statute of limitations has been tolled, it is not necessary that plaintiff obtain a thorough understanding of all the facts to halt the suspension. Defendant is not required to wait until plaintiff has started substantiating its claims by the discovery of evidence. Once plaintiff is on inquiry that it has a potential claim, the statute can start to run.

Japanese War Notes Claimants Association of the Philippines, Inc. v. United States, 373 F.2d 356, 359 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967). By this standard, plaintiffs could have brought their claim even without the benefit of these new documents.

In an attempt to reduce their burden, plaintiffs advance several arguments concerning the requirement of due diligence, each of which can be quickly met. They argue that "aggravating factors," such as "governmental secrecy, misrepresentations, exclusive control of evidence pertain-

ing to military necessity, unidentified informants, and intentional efforts to conceal evidence," should be weighed in judging due diligence. Plaintiffs' Supplemental Memorandum on the Statute of Limitations at 15 (Jan. 20, 1984). But the due diligence standard was developed in the context of fraudulent concealment; to consider these "aggravating factors" would be the equivalent of double counting. Secondly, plaintiffs urge that the degree of difficulty in gathering the necessary documents—which they say were spread out over more than eighteen archival libraries in seven different states—should be considered in tolling the statute. The crucial time period in this regard, however, is not the time needed to assemble every relevant document, but the time needed to assemble information sufficient to file a complaint. As has been set out more fully above, all of the necessary facts have long been in the public domain, available to a diligent plaintiff and counsel.[30] Finally, plaintiffs argue that the due diligence requirement is lessened here because a fiduciary relationship existed between defendant and plaintiffs, putting an additional burden of disclosure on defendant. No such relationship can be established, however, as will be discussed below.

D.

In addition to their constitutional claims, plaintiffs seek recovery under the Tucker Act on several contract theories (Count XXI).[31] They assert that express contracts, both oral and written, arose from promises by General DeWitt and other United States officials concerning the nature, purpose, and duration of the detention and the services

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[30] The books cited *supra* note 26 are replete with relevant research.

[31] The Tucker Act gives the Court of Claims "jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States. . . ." 28 U.S.C. § 1491. The district courts have concurrent jurisdiction for contract claims not exceeding $10,000. 28 U.S.C. § 1346(a)(2).

and protections to be accorded plaintiffs. For example, Civilian Exclusion Order No. 5 (Complaint, Exhibit I) stated that the government would

> Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc.

Plaintiffs also allege the existence of implied in fact contracts based on defendant's "actions and directives assuming complete custody and care for plaintiffs and their property. . . . Plaintiffs correspondingly complied with government requests to abandon their homes, businesses, and properties, and sacrifice their freedoms." Plaintiffs' Opposition to Motion to Dismiss at 26 (July 15, 1983). Finally, plaintiffs allege express and implied contracts of bailment between plaintiffs and defendant for property seized by defendant or surrendered to its custody during the war, most of which has not been returned or accounted for.

In evaluating plaintiffs' claims, it must be kept in mind that the Tucker Act's waiver of sovereign immunity is limited to express contracts and contracts implied in fact; it does not extend to contracts implied in law or founded upon equitable principles. *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 709 (1984); *Knight Newspapers, Inc. v. United States*, 395 F.2d 353, 357 (6th Cir. 1968). In addition, contracts with the United States based on oral promises by a federal official are not valid absent proof that the official had the actual authority to make them. "One who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with the actual authority to enter the contract alleged." *Jackson v. United States*, 573 F.2d 1189, 1197 (Ct. Cl. 1978).

It is questionable whether the evacuation, which was authorized by military and executive order rather than mutual agreement, gave rise to any express or implied contracts. Yet even assuming that plaintiffs' contract claims are valid, those claims would be barred by the six-year statute of limitations that applies to contract claims under the Tucker Act. 28 U.S.C. § 2401(a). Plaintiffs allege that the government promised to protect their persons and property. Failure to do so would have been evident both during and after the war. The statute would have begun to run at that time.

The statute of limitations would also bar plaintiffs' bailment claims, assuming those claims to be valid. Plaintiffs have not alleged when the government was expected to return the bailed goods. It would seem reasonable to conclude, however, that both parties expected demand for delivery to be made upon plaintiffs' release from internment. Yet even if there was no specified time of demand, plaintiffs cannot wait almost forty years to demand delivery. Where no time for demand is specified by contract, demand must be made within a reasonable time after the bailor is entitled to the return of the property. 8 C.J.S. *Bailment* § 45, at 497 (1962). That period would have expired soon after the war.

E.

Plaintiffs' final count under the Tucker Act alleges that defendant, through the evacuation and internment program, established a system of comprehensive and pervasive federal control over every aspect of plaintiffs' daily lives (Count XXII). According to plaintiffs, this system gave rise to a fiduciary relationship, with the United States as trustee and plaintiffs as wards or beneficiaries. The United States is alleged to have breached its fiduciary duties by failing to protect plaintiffs' property and civil liberties. Plaintiffs claim that the United States is liable for money damages for this breach.

Plaintiffs draw their fiduciary responsibility claim from the Supreme Court decision in *United States v. Mitchell*, 103 S.Ct. 2961 (1983). In that case, the Court found that a fiduciary relationship existed between the United States and certain Indian tribes with respect to management of Indian resources and land. The existence of the fiduciary relationship was held to give the Indians the right to seek money damages from the United States. The Court based its finding of a fiduciary relationship in part on the "elaborate" and "pervasive" control that the federal government exercised over Indian property through various statutes and regulations. 103 S. Ct. at 2972 & n.29. The Court also pointed to precatory statutory and regulatory language directing the government to consider "the needs and best interests of the Indian owner and his heirs" and to dispose of proceeds from timber sales to the "benefit" of the Indian owners. The Court was also influenced by the "undisputed existence of a general trust relationship between the United States and the Indian people." *Id.* at 2972.

Plaintiffs analogize the "pervasive" control over their lives in the internment camps to that found in the *Mitchell* opinion and urge that a similar fiduciary relationship exists here. However, the comparison does not withstand close scrutiny. No act of Congress evidences an intent to create a fiduciary relationship between plaintiffs and defendant. No general trust relationship exists between plaintiffs and defendant. In fact, nothing here is analogous to the historic relationship between the United States and the American Indians, created by treaty, judicial doctrine, and elaborate legislation. *See Cohen's Handbook of Federal Indian Law* 220-28 (R. Strickland ed. 1982).

F.

In addition to basing jurisdiction on the Tucker Act, plaintiffs assert jurisdiction for almost all of their claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§

1346(b), 2401(b), 2671-2680. The FTCA allows individuals who are injured by federal government officials and employees in the course of their official duties to seek money damages from the United States. That waiver, however, is subject to numerous conditions. One condition placed on the waiver is that the district court shall not have jurisdiction unless the claim has first been presented and denied by the appropriate federal agency. 28 U.S.C. § 2675(a). Plaintiffs have filed no administrative claims here. They argue, however, that a variety of equitable and practical reasons dictate that they should not be required to exhaust their administrative remedies. Plaintiffs contend, for example, that filing would be impractical, given the size of the plaintiff class, and unnecessary, since the government already has full notice of plaintiffs' claims and an independent agency—the Commission—has recently investigated the incidents underlying the suit. They also claim an equitable exemption from filing where the government has concealed information pertinent to their claims. The line of cases plaintiffs cite to support an equitable exemption, however, applies only where the injured party did not know or have reason to know of the government's involvement in the tort. That is not the case here. More generally, the Court is bound to respect conditions placed by Congress on a waiver of sovereign immunity, particularly when those conditions are expressed in clear and forceful language. The filing requirement applies to all claims, including class actions. *See In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 757 (E.D.N.Y. 1980)[32]

Even if plaintiffs had exhausted their administrative remedies, their claims would be barred by the FTCA's two-

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[32] Plaintiffs request in the alternative that this suit be stayed to allow them to exhaust their administrative remedies. Since the Court does not have jurisdiction of the FTCA claims, it cannot grant plaintiffs' request.

year statute of limitations, 28 U.S.C. § 2401(b). Plaintiffs' FTCA claims can be classified into four groups: negligence, intentional law enforcement torts, constitutional violations sounding in tort, and civil rights claims. The FTCA waives sovereign immunity for claims accruing on and after January 1, 1945, a date which falls toward the end of the sequence of events underlying this suit. It will be assumed, without deciding, that all of plaintiffs' claims fall within the time period since the FTCA became effective.

Plaintiffs' negligence claim alleges that defendant failed to exercise reasonable care in its capacity as custodian of plaintiffs' person and property (Count XX). Because of defendant's negligence, plaintiffs allege, their property was lost or destroyed and they were poorly housed, fed, and cared for.[33] Any damage to plaintiffs' person or property caused by defendant's lack of due care would have been evident to plaintiffs at the time the injury occurred. If such a claim had been filed, and military necessity had been raised as a defense, plaintiffs have long had access to sufficient information to attempt to rebut that defense. These claims therefore would be time barred.

Plaintiffs state three counts that can be classified as intentional law enforcement torts. Count XVII alleges assault and battery, in that defendant's actions subjected plaintiffs to "numerous physical and psychological injuries, fear of imminent bodily harm, and death." Count XVIII alleges false arrest and false imprisonment, in that the exclusion and internment was without legal authority or colorable legal claim. Count XIX alleges abuse of process and malicious prosecution.

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[33] Plaintiffs also allege that defendant negligently failed "to pursue means within its control for confirming plaintiffs' loyalty and securing plaintiffs' prompt release." Complaint, ¶ 132. It seems doubtful that defendant had a responsibility under tort law to secure plaintiffs' prompt release from internment. Even so, that claim would also be time barred.

Until 1974, the FTCA excluded claims arising out of intentional torts, including assault, battery, false imprisonment, false arrest, malicious prosecution, and abuse of process, from its waiver of sovereign immunity. In that year, Congress amended the FTCA to include these intentional torts when committed by federal "investigative or law enforcement officers." 28 U.S.C. § 2680(h). For plaintiffs' claims to succeed, therefore, they must "arise" after the 1974 amendment and have been committed by investigative or law enforcement officers as defined in the statute.

Plaintiffs assert that defendant's concealment of information prevented these claims from accruing until after 1974. But the facts that compel the conclusion that plaintiffs' other claims are time barred produce the same conclusion here. These causes of action are based on the premise that there was no military necessity for the exclusion, that officials in the military and government knew this to be so, but that they used military necessity as a pretext to achieve other goals. Plaintiffs could through due diligence have gathered sufficient information to assert these claims well before 1974.

Plaintiffs also allege that defendant conspired with its own officers and with state and local officials to deprive plaintiffs of their civil rights in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 (Count XVI). The civil rights statutes create causes of action only against individuals and municipalities and do not themselves contain a waiver of sovereign immunity.[34] Plaintiffs contend, however, that civil

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[34] *United States v. Timmons*, 672 F.2d 1373, 1380 (11th Cir. 1982) (§§ 1981, 1982 do not waive sovereign immunity); *Unimex, Inc. v. Department of Housing and Urban Development*, 594 F.2d 1060, 1061 (5th Cir. 1979) (all sections); *Monarch Insurance Co. v. District of Columbia*, 353 F. Supp. 1249, 1252 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974) (§ 1983); *Community Brotherhood of Lynn, Inc. v. Lynn Redevelopment Authority*, 523 F. F Supp. 779, 782-

rights claims, as well as tort claims based on the constitution, can be brought within the FTCA's waiver of immunity. A recent opinion of this Circuit, however, brings this argument into question.[35] Yet even if plaintiffs were correct, their claims would be time barred for the reasons stated above.

G.

Plaintiffs allege several other jurisdictional bases, none of which are applicable here. The general federal question jurisdiction statute, 28 U.S.C. § 1331, does not waive sovereign immunity in actions essentially seeking money judgments from the United States. *Larsen v. Hoffman*, 444 F. Supp. 245, 255 (D.D.C. 1977). The Administrative Procedure Act (APA), 5 U.S.C. § 702, effects a limited waiver of sovereign immunity in actions for specific relief such as injunctions or declaratory judgments. But plaintiffs can seek no such relief here. Also, the APA does not confer authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief sought. *Larsen*, 444 F. Supp. at 255. For both reasons, the APA is inapplicable here. Finally, there is no justiciable controversy here that would be appropriate for a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. The All Writs Act, 28 U.S.C. § 1651,

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83 (D. Mass. 1981) (§ 1986); *Hill v. McMartin*, 432 F. Supp. 99, 101 (E.D. Mich. 1977) (§§ 1983, 1985, 1986).

[35] This Circuit has stated that

> Because the FTCA's general waiver of immunity extends only to acts or omissions that would be tortious under state law, there is a question whether constitutional torts that do not also constitute torts under state law are cognizable under the FTCA.

Gray v. Bell, 712 F.2d 490 (D.C. Cir. 1983), *cert denied*, 52 U.S.L.W. 3687 (U.S. Mar. 19, 1984); *see also Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978) (constitutional violations are not actionable under the FTCA). Civil rights claims made under the FTCA would be subject to the same objection.

empowers the courts to issue writs necessary or appropriate "in aid of their respective jurisdictions" but does not provide jurisdiction in and of itself.

CONCLUSION

For the above cited reasons, defendant's motion to dismiss must be granted. This ruling is not a fresh appraisal of the merits of the wartime decision, based on what now appears to be a questionable rationale of military necessity, to intern 120,000 citizens and residents because of their race.[36] It may be that timely claims on their behalf would have prevailed. But it is now close to forty years after the camps were closed, and almost that long after the facts essential to those claims were published. Much time has passed, memories have dimmed, and many of the actors have died.[37] These concerns are reflected in the statutes of limitation, and it is those statutes which present the ultimate bar to plaintiffs' claims.

In holding that plaintiffs' claims are time barred, the Court is mindful of this Circuit's warning that there is an "inherent problem in using a motion to dismiss for purposes of raising a statute of limitations defense." *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981). Often, plaintiffs can find material issues of fact which require evidentiary hearings or at least a boiling down of factual disputes by a summary judgment process.

The granting of a motion to dismiss on limitations grounds is appropriate where, as here, the motion challenges the Court's subject matter jurisdiction on the basis of the pleadings and historical records. *See D.C. Transit*

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[36] In 1976, President Gerald Ford formally repealed Executive Order No. 9066 and stated that the evacuation was one of our "national mistakes" and was "wrong." Proclamation 4417, 41 *Fed. Reg.* 7741 (Feb. 20, 1976).

[37] For example, General DeWitt, a critical witness, died in 1962.

System, Inc. v. United States, supra note 4, at 1440 n.1; *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107, 1118 (9th Cir.), *cert. denied*, 103 S. Ct. 570 (1982).[38] The statute of limitations issue has been exhaustively briefed in the motion to dismiss, response, and reply and in supplemental briefs and replies requested by the Court. Oral argument was heard by the Court. The facts relevant to the motion are set out in the complaint, official documents filed with the complaint, *Personal Justice Denied*, and other historical writings publicized about the evacuation and internment.[39] There are no disputes about material facts relevant to the Court's conclusion.

Plaintiffs strenuously contend that those who suffered the evacuation and internment have not been adequately compensated. The Commission on Wartime Relocation and Internment of Civilians recommended that Congress create a $1.5 billion fund from which compensatory payments of $20,000 would be made to each present survivor of the evacuation and internment. The remainder would be used for public educational purposes and for the general welfare of the Japanese American community. Bills are now before Congress that would implement some or all of those recommendations.[40] The careful spadework which plaintiffs

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[38] *See also* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 139-40 (Supp. 1984).

[39] All of these sources may properly be considered by a court ruling on a motion to dismiss a complaint as time barred. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 549-50 (1969).

[40] *See, e.g.*, S. 2166, 98th Cong., 1st Sess. (1983); H.R. 4110, 98th Cong., 1st Sess. (1983); H.R. 3387, 98th Cong., 1st Sess. (1983); S. 1520, 98th Cong., 1st Sess. (1983).

In dealing with the American Indians, Congress encountered a similar situation, in which Indian tribes were denied a forum to bring treaty-based claims against the United States by the doctrine of sovereign immunity. Congress responded by creating the Indian Claims Commission. *See Cohen's Handbook of Federal Indian Law* 563-64 (R.

have done in the prosecution of their claims in court should contribute to making their argument to Congress more persuasive. And it may be that Congress will focus more closely on these claims once plaintiffs have exhausted their possible judicial remedies.

Date: May 17, 1984

/s/ LOUIS F. OBERDORFER
UNITED STATES DISTRICT JUDGE

Strickland ed. 1982). The American-Japanese Evacuation Claims Act was a step in this direction but was significantly limited in the scope of relief it granted.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED AUG. 8, 1983

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and

NATIONAL COUNCIL FOR
JAPANESE AMERICAN REDRESS
925 West Diversey Parkway
Chicago, IL 60625

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Serve: The Honorable William French Smith
Attorney General of the United States
Department of Justice
Constitution Avenue between
9th and 10th Street, N.W.
Washington, D.C. 20530

and

Stanley S. Harris, Esquire
United States Attorney for
the District of Columbia
United States Courthouse
3rd & Constitution Avenue, N.W.
Washington, D.C. 20001

Defendant.

AMENDED COMPLAINT FOR MONETARY AND DECLARATORY RELIEF FOR VIOLATION OF PLAINTIFFS' CONSITUTIONAL RIGHTS OF DUE PROCESS, EQUAL PROTECTION, JUST COMPENSATION, SPEECH, PETITION, PRIVACY, TRAVEL, FREEDOM FROM UNREASONABLE SEARCH AND SEIZURE, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, BREACHES OF CONTRACT AND FIDUCIARY DUTY, AND CIVIL, STATUTORY, AND COMMON LAW RIGHTS

INTRODUCTION

1. This is a class action brought on behalf of approximately 120,000 American citizens and other residents of the United States who, solely because of their Japanese ancestry, were subjected to forcible segregation, arrest, exclusion, imprisonment, and other deprivations of their most fundamental constitutional rights during World War II by defendant the United States of America (hereinafter the "defendant" or the "United States").

2. In 1980, Congress for the first time mandated a full review of the facts and circumstances underlying these deprivations, and assigned this duty to a specially created Commission on Wartime Relocation and Internment of Civilians (hereinafter the "Commission"), pursuant to P.L. 96-317. The Commission held 20 days of hearings and received testimony from more than 750 witnesses, including government officials, public figures, historians, and hundreds of Americans of Japanese ancestry who were subjected to wartime deprivations. The Commission also conducted extensive independent archival research of the original records of the government's actions, resulting in

the location, declassification, and release of many crucial documents which had never before been subjected to public scrutiny. Based on this testimony and research, the Commission on February 24, 1983 issued its authoritative report, entitled *Personal Justice Denied.*

3. The Commission concludes that defendant's treatment of the plaintiff class "was not justified by military necessity," and that the imprisonment and continued exclusion of plaintiffs from the West Coast of the United States "were not driven by analysis of military factors." Rather, these wartime deprivations were caused by "race prejudice, war hysteria, and a failure of political leadership." *Personal Justice Denied,* p. 18.

4. Recently obtained evidence also demonstrates, as hereinafter alleged, that at the time of these actions responsible United States officials *knew* their actions were in direct contradiction to authoritative intelligence reports already in defendant's possession attesting to the loyalty of the plaintiff class and the absence of any need to subject them to mass deprivations of their civil rights.

5. Newly discovered evidence further establishes that defendant has engaged in a long-standing conspiracy to deprive the plaintiff class of judicial redress for defendant's unlawful actions, by intentionally misrepresenting and suppressing information in defendant's possession which attested to plaintiffs' loyalty to the United States; by making false and patently racist claims concerning alleged disloyal acts and propensities of plaintiffs; by attempting to revoke plaintiffs' rights of citizenship and *habeas corpus*; by maliciously interfering with plaintiffs' access to the courts; and by punishing and threatening plaintiffs for challenging the legality of defendant's actions against them.

6. Defendant's actions have inflicted manifest personal injustice on plaintiffs, including massive deprivations of plaintiffs' constitutional rights as Americans; loss of their homes, businesses, education, and careers; severe physical

and psychological injuries; loss of life; destruction of family ties; and tremendous personal stigma. The Commission finds plaintiffs have never received full or fair compensation for these injuries.

7. Plaintiffs now seek compensation for the injuries defendant inflicted upon them solely on account of their race and national ancestry, and a judicial declaration of the manifest injustice done to them.

JURISDICTION

8. This Court has jurisdiction of this action pursuant to 5 U.S.C. §702; 28 U.S.C. §§1331, 1343, 1346(a)(2), 1346(b), 1651, and 2201-2; and 50 U.S.C. App. §§1981-1987. This action arises under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Thirteenth Amendments and other provisions of the Constitution of the United States; the Civil Rights Acts, 42 U.S.C. §§1981-1988; the Federal Tort Claims Act, 28 U.S.C. §§2671 *et seq*; and other statutory and common law rights of the states and federal government. The matter in controversy with respect to all causes of action hereinafter enumerated, except those sounding in tort, does not exceed $10,000 for each cause of action by each plaintiff.

PLAINTIFFS

9. Named individual plaintiffs are United States citizens and residents of Japanese ancestry, and representatives of such persons no longer living, who reside at the addresses set forth in the caption of this Complaint. These plaintiffs sue individually and as representatives of the class of approximately 120,000 persons of Japanese ancestry in the United States who were subjected to forcible segregation, arrest, exclusion, imprisonment, and other deprivations of their liberties during World War II pursuant to Presidential Proclamation 2525, Executive Order 9066, or other

actions and orders of the United States, its officers, agents, and employees.

10. Plaintiff William Hohri is an American citizen of Japanese ancestry. On the night of December 7, 1941, Federal Bureau of Investigation (FBI) agents came to his home in North Hollywood, California and seized and imprisoned his father, a Methodist clergyman, without any warrant, notice of charges against him, or explanation of where he was being taken. Plaintiff Hohri was separated from his father for the next two and on-half years. In April 1942, U.S. officials forced Plaintiff Hohri, then age 15, and the remainder of his family into a prison camp in Manzanar, California, where they were surrounded by barbed wire, armed guards, and watch towers. The camp had only primitive communal eating and bathing facilities, which were grossly inadequate for the lengthy imprisonment of American families. He was denied privacy, furniture, and other facilities for basic human needs. His family life was destroyed by the conditions in the camp. He saw his brother become gravely ill from tuberculosis due to inadequate medical care and other conditions in the camps. Formerly a straight-A student, he was denied schooling until late 1942 and then was subjected to such substandard schools that he lost all interest in furthering his education. His self-esteem as an American citizen was seriously injured by the United States' discrimination against him. He suffered irreparable loss of his liberty and the normal pursuits of a young life. No redress or compensation has been provided to Plaintiff Hohri for these personal injustices.

11. Plaintiff Hannah Takagi Holmes is an American citizen of Japanese ancestry. She has been deaf since the age of two. In May 1942, when she was barely 14 years old, the U.S. military seized her and her family, and forced them onto trains patrolled by heavily armed U.S. soldiers, destined for detention camps. She was terrified about what would happen to her and thought she was being taken to

a death camp. U.S. officials in the camps denied her schooling because of her deafness, and forbade her from using the only method of communication available to her, American sign language. She was forced to work in the camp's camouflage net factory, for negligible or no compensation. As a result of the United States' actions against her, she has suffered severe educational and psychological injury, stigmatization, and hostility solely on account of her Japanese ancestry, without compensation or other reparation by the United States.

12. Plaintiff Chizuko Omori is a third generation American citizen of Japanese ancestry. In May 1942, her life as an ordinary 12-year old child was harshly interrupted by her forced exile to a detention camp in the deserts of Arizona, where she lived in terror, confusion, and embitterment. She knew she was an American and wanted to be treated as an American, but her mother asked her, "If you are truly an American, what are you doing in this camp?" Plaintiff Chizuko Omori has never found an answer to that question. The anger and grief to which she was subjected in the camps have caused her irreparable psychological injury and destruction of family ties, for which she has never received any compensation or declaration of wrongdoing by the United States.

13. Haruko Omori, deceased, was an American citizen of Japanese ancestry who is here represented by her daughter, Plaintiff Chizuko Omori. In early 1942, she was illegally uprooted from her home in California and forced at gunpoint onto crowded trains that took her to a detention camp called Poston I, deep in the deserts of Arizona. There, she and her family, all second and third generation Americans, were confined in a tar-paper barrack behind barbed wire and armed guards, cut off from all contact with the outside world, and forced to exist in a harsh life for three and one-half years. She was embittered by the incarceration and by U.S. order that she swear an oath of loyalty to the United States, after that

same government had imprisoned her in a detention camp. The defendant's actions caused her alienation, grief, and irreparable psychological injury, which led to her death by bleeding ulcers at age 35, within a short time following her release from the camps. No compensation or other redress was ever provided to Haruko Omori or her survivors.

14. Plaintiff Midori Kimura is a permanent resident of the United States who came here from Japan in 1919 to marry her husband. By 1942, she and her husband had lived in their home in San Jose for 22 years, had seven children, and were enjoying a happy, prosperous life, even though she was denied U.S. citizenship due to discriminatory naturalization laws. In May 1942, the United States inexplicably ordered Plaintiff Kimura and her family banished from their home and forced them into prison camps in Santa Anita, California and Heart Mountain, Wyoming. She suffered unbearable fear and pain from seeing her children—all American citizens—confined behind barbed wire by armed guards. For over three years, she lived a life filled with terror of an unknown future and numerous hardships in the camps. She suffered a complete lack of privacy and means of preserving her family discipline and lifestyle. Her family was forced to separate in order to survive; her husband died of stress following this imprisonment. Plaintiff Kimura was denied any redress or compensation these deprivations and losses.

15. Plaintiff Merry Omori is an American citizen of Japanese ancestry. In 1942, she was twelve years old and one of nine children, all between two and sixteen years of age, whose mother had recently died. In May 1942, the United States ordered her entire family incarcerated, forcing them to abandon a successful farming business, valuable equipment, and their house with all their furniture and belongings. Soon after their forced departure, their house was burned and all of the family's belongings were looted, stolen, or destroyed, due to defendant's failure to protect

their property. In the Walerga detention camp in Sacramento, California, her "family unit" of twelve persons lived in a single, twenty-two foot room with no privacy, toilets, or running water. Open sewer trenches ran between the barracks. She was subsequently forced to move to a prison camp in Tule Lake, California, where tanks and armed guards patrolled the camp perimeters. An American citizen by birth, she was tear-gassed, despised, rejected, scorned, and placed in daily fear of her life in the camps due solely to her Japanese ancestry. Defendant has failed to provide redress or compensation for these injuries.

16. Plaintiff John Omori is an American citizen of Japanese ancestry. In 1941, he was a high school student aiming for a college sports scholarship. In May 1942, he was forcibly expelled from his community and imprisoned in a detention camp in Poston, Arizona. He remained in United States custody for over three years. Due to defendant's wrongful acts, his family's and his own personal property was lost or stolen, the family was separated for most of the war, and Plaintiff John Omori suffered psychological and emotional trauma. He volunteered to serve in the Navy, Marines, or Coast Guard, but was rejected solely because of his race. He refused to be drafted into the Army because the Army was imprisoning his family solely because of their race; as a result, he was arrested, jailed, and convicted for his resistance. Following the end of the war, Plaintiff Omori served his country in the U.S. Army. Defendant has failed to provide compensation and redress for these personal injustices.

17. Juro Omori, deceased, is represented here by his son, Plaintiff John Omori. The elder Mr. Omori came to America at age eighteen. By 1941, he had lived in the United States for 35 years and was a prosperous farmer, but was denied U.S. citizenship solely due to his Japanese ancestry. On December 8, 1941, FBI agents entered his house without search or arrest warrants, seized and destroyed certain personal property, and threatened to shoot

him. He was subsequently arrested without notice of any charges against him, and imprisoned in local jails and federal prison camps, where he was threatened by armed U.S. officials, prohibited from notifying his family of his whereabouts, and subjected to life-threatening conditions. When he complained to U.S. officials about the inadequate food and medical care provided in the prison camp at Poston, Arizona, he was rearrested, and subjected to further threats and punitive measures. His good reputation and business were ruined by defendant's actions against him. He was forced to remain in the detention camps until they closed in 1946. During his four and one-half years of imprisonment by the defendant United States, he was never provided any warrant, notice of any charges against him, proof of any wrongdoing, or compensation for the wrongful actions taken against him.

18. Plaintiff Gladyce Sumida is an American citizen of Japanese ancestry, born in Fresno, California. In early 1942, when she was only ten years old, she and her family lived in daily fear of being seized from their home and placed in prison camps, due to U.S. actions against persons of their race. Her family destroyed records and other items hinting of Japanese culture and surrendered, without compensation, items which defendant had declared "contraband" for Japanese Americans. Despite their loyalty and caution, Plaintiff Sumida and her family were subjected to illegal searches, driven from their home, and incarcerated in a prison camp in Gila River, Arizona for a period of two and one-half years. Due to the United States' failure to protect the property which the family had been forced to leave behind, their property was ransacked and destroyed. Plaintiff Sumida, now a resident of the District of Columbia, has been grievously injured by being forced to live her childhood in the confines of a prison camp, solely because of her race and national ancestry. No redress has ever been provided for these wrongs.

19. Plaintiff Kyoshiro Tokunaga was, in 1942, a permanent resident of the United States who had immigrated here from Japan, but who was barred from becoming a U.S. citizen due to discriminatory naturalization laws. In early 1942, Plaintiff Tokunaga was 35 years old and was a respected leader in the Japanese American community in Los Angeles, California, where he taught in three schools for Japanese Americans. On March 13, 1942, FBI agents surreptitiously entered his home and illegally searched and ransacked all his personal papers and belongings, without his knowledge or consent. Plaintiff Tokunaga was arrested without warrant or evidence of wrongdoing. Over the next four and one-half years, he was imprisoned in numerous jails and prison camps, mostly in the custody of Army or Department of Justice officials. There, he was subjected to inhumane conditions, forced labor, censorship of his communications, and threats by federal officials. When he petitioned for his release after the war, he was further threatened with deportation. He was finally released from the camps in November 1946, some fifteen months after the cessation of hostilities against Japan. As a result of defendant's actions against him, Plaintiff Tokunaga has suffered extreme deprivations of liberty, destruction of his personal property, loss of income and reputation, and other injuries. Defendant has failed to provide him any redress for these injuries.

20. Plaintiff Tom Nakao is an American citizen of Japanese ancestry. In May 1942, when he was a 17-year old high school student in Sacramento, California, he and his family were expelled from their home and forced into prison camps, first at Marysville, California, then at Tule Lake, California and Topaz, Utah. Due to defendant's actions, they lost their successful farming business at peak season, their home was burned down upon their departure, and their tools, equipment, and car were stolen. While in the camps, Plaintiff Nakao was severely injured and incapacitated for eight months due to the negligence and

inadequate medical care of camp officials. Plaintiff Nakao was maliciously denied requests for leave clearance from the camps, at the same time he was repeatedly pressured to serve on combat duty for the United States. Plaintiff Nakao has suffered continuing physical, financial, and psychological injuries as a result of these actions against him, but defendant has failed to provide him full or fair compensation for these injuries.

21. Plaintiff Harry Ueno is an American citizen of Japanese ancestry. In early 1942 his successful business career and family life were interrupted by U.S. orders forcing him into a detention camp in Manzanar, California. There, he called public attention to shortages of essential foods in the camp's diet; as a result, defendant subjected him to harassment and punishment. In December, 1942, he was wrongfully arrested by defendant, causing a mass gathering and protest by camp residents. Defendant fired into the defenseless crowd with guns and teargas, wounding and killing several innocent residents. He was subsequently incarcerated in numerous local jails and special high security prison camps, where he was subjected to constant threats and brutality by U.S. officials, denied basic food, hygiene, and other human needs, and prohibited from communicating with his family. Each protest on his part brought increased punishment, inhumane treatment, and threats to his life. The U.S. promised him a fair hearing but never provided him a trial or any semblance of a hearing, never informed him of any charges against him, and never provided him full or fair compensation according to law.

22. Plaintiff Edward Tokeshi is an American citizen of Japanese ancestry. In the Spring of 1942, he was finishing his last semester at the University of California/Berkeley and had plans for marriage and career following his graduation that June. His plans were harshly interrupted by U.S. orders forcing him into prison camps, first in Pomona, California and then at Heart Mountain, Wyoming. At great

financial loss he was forced to sell his farm, crops, equipment, and business, and to abandon all of his personal property, which was subsequently stolen. The financial ruin and personal upheavals caused by detention, combined with his forced departure from college, subjected him to years of lost income and lost business opportunities. Despite Plaintiff Tokeshi's American citizenship and willingness to prove his loyalty to the United States by serving in combat duty, he was inexplicably classified as an "unacceptable alien." He was forced to speed up his plans for marriage, and he and his young bride, both loyal American citizens, began their life together behind the barbed wire confines of the prison camps. Defendant has never provided full or fair compensation to Plaintiff Tokeshi for this manifest injustice.

23. Plaintiff Kinnosuke Hashimoto was, in 1942, a permanent resident of the United States and lived in Oakland, California with his wife and four children, who were American citizens by birth. Despite discriminatory federal laws denying him United States citizenship, he was a successful businessman, earning over $15,000 per year. In the Spring of 1942, he and his family were ordered, without cause, to abandon their home and business, and to enter prison camps at Tanforan, California and Topaz, Utah. As a result of being uprooted and imprisoned, Plaintiff Hashimoto incurred substantial financial losses on his business, investments, and personal property, and severe losses of liberty and reputation. Although he swore his loyalty to the United States, he was imprisoned for two and one-half years. His wife and two of his children were imprisoned for three and one-half years. Plaintiff Hashimoto is now over 90 years of age; following his release from imprisonment and the repeal of discriminatory naturalization laws, he became a United States citizen, but the U.S. has never provided redress for the grave injustices done to him.

24. Plaintiff Nelson Yuji Kitsuse is an American citizen of Japanese ancestry who in early 1942 was a student at

the University of Southern California. Without evidence that he was engaged in any illegal activity whatsoever, he was subjected to racial curfew and travel restrictions, and then forced to terminate his studies and surrender his freedom, solely on account of his Japanese ancestry. In May 1942, he was forcibly incarcerated in a detention camp in Poston, Arizona. He was subsequently drafted and he served in the U.S. Army for two years. Because of the United States' illegal actions against him, Plaintiff Kitsuse suffered grievous loss of his personal freedom, damage to his education, and other personal injuries, for which he has never been compensated.

25. Takeshi Kitsuse, deceased, was a permanent resident of the United States who is here represented by his son, Plaintiff Nelson Yuji Kitsuse. In 1942, the elder Mr. Kitsuse was 63, had lived most of his adult life in the United States, and had built a happy, prosperous life while working as a foreman for the American Fruit Growers. By U.S. orders, he and his family were banished from their home, business, and community, their property was subsequently stolen or destroyed, and the family was incarcerated in a detention camp in Poston, Arizona. The United States had, without any cause, transformed his good reputation into that of an allegedly terrible enemy of America, solely on account of his Japanese ancestry. Defendant caused him great psychological pain, financial ruin, and shame, and has never provided full or fair compensation to him or his survivors.

26. Plaintiff Eddie Sato is an American citizen of Japanese ancestry. In early 1942, he was a recent high school graduate and held a responsible job in a bakery. In May 1942, he was uprooted from his home, community, and job, and was forcibly incarcerated in detention camps, first in Puyallup, Washington, and then in Minidoka, Idaho. While in the detention camp, he was recruited for and volunteered to serve in the U.S. Army's 442nd Regimental Combat Team (hereinafter the 442nd RCT), a racially seg-

regated Army unit consisting solely of Americans of Japanese ancestry. He served his country valiantly until his discharge in November 1945. Due to defendant's actions, Plaintiff Sato has suffered severe loss of earnings and business opportunities, and psychological injury, without full and fair compensation according to law.

27. Plaintiff Sam Ozaki is an American citizen of Japanese ancestry. In early 1942, while he was still a high-school student, he was forced into a detention camp, euphemistically called an "assembly center," at the Santa Anita Race Track in California. There, whole families were housed in horse stalls and other inhumane quarters, and were denied basic hygiene, food, and medical care. He was subsequently transferred to a detention camp in the hot, humid swamplands of Jerome, Arkansas. At the same time defendant incarcerated Plaintiff Ozaki because of his race, it also sought to recruit him for the 442nd RCT. He volunteered and served in the 442nd RCT from 1944 to 1946. He was prevented from seeking redress for defendant's discriminatory actions by the United States' improperly-procured Supreme Court decisions condoning U.S. actions, and by his fear of U.S. retaliation against him. These actions by the United States subjected Plaintiff Ozaki to profound psychological and emotional injury, loss of his good reputation, and disruption of his education, without full or fair compensation according to law.

28. Kyujiro Ozaki, deceased, was a permanent resident of the United States who is here represented by his son, Plaintiff Sam Ozaki. In early 1942, the elder Mr. Ozaki was 65 years old. Even though denied United States citizenship due to his Japanese ancestry, he had built a thriving fertilizer sales business in California, and had three children in college. In February 1942 he was illegally arrested by U.S. officials, without warrant or charges against him. He was incarcerated in numerous local jails and prison camps, was subjected to threats and inhumane conditions, and was denied communication with his family. He was

emotionally devastated by his helplessness to prevent U.S. officials from driving his family from their home and schools into detention camps. As a result of U.S. actions against him and his family during his three and one-half years of illegal incarceration, Mr. Ozaki was a spiritually broken man, and was never able to regain his self-dignity. No reparations for this manifest personal injustice have ever been made.

29. Plaintiff Kumao Toda, a resident of the District of Columbia, is an American citizen of Japanese ancestry, born in Los Angeles, California. In early 1942 he was nineteen years old, taking night classes at UCLA, and working during the day to help support his family. In April 1942, he and his family were driven from their home into prison camps at the Santa Anita Race Track, California, and Rohwer, Arkansas. After the United States government had uprooted him, treated him as an enemy alien, and imprisoned him in a barbed wire enclosed camp for over a year, that same government demanded that he sign a "loyalty questionnaire," stating whether he would swear unqualified allegiance to the United States and would serve on combat duty, wherever ordered. He was subsequently drafted into the U.S. Army, where he served his country valiantly for four years in a military and then in a civilian capacity in Japan. As a result of United States actions against him, Plaintiff Toda has been deprived of his most cherished liberties and rights of citizenship, without compensation or other form of redress.

30. Suketaro Toda was a permanent resident of the United States, now deceased, who is here represented by his son, Plaintiff Kumao Toda. The elder Mr. Toad ran a successful beer and wine distributorship in Los Angeles, but following the attack on Pearl Harbor, his assets were frozen and he was forced to close his business, solely because of his Japanese ancestry. After that time, he had no source of income for his family's livelihood or his children's education. In April 1942, the United States ordered

him and his family to enter prison camps, causing the loss of all of his business interests, earnings, and personal property. Despite his statements that he was loyal to the United States and would abide by all laws, he was imprisoned for three years, first at Santa Anita, California, then at Rohwer, Arkansas. As a result of defendant's actions against him, the prosperous life and security Mr. Toda had built for his family were destroyed, without redress or compensation.

31. Plaintiff Kaz Oshiki is an American citizen of Japanese ancestry. In early 1942, when he was a 17-year old college student, he was driven from his home, school, and community, and forced into detention camps, first at Santa Anita, California, then at Rohwer, Arkansas. There he was deprived of his freedom and subjected to squalid living conditions, causing him tremendous bitterness. He subsequently volunteered for the Army's Military Intelligence Service Language School, and thereafter served in the Pacific Theater. Plaintiff Oshiki, now a resident of the District of Columbia, has suffered substantial personal and financial hardships, and injury to his good reputation due to United States actions against him, which personal injustices have never been remedied.

32. Plaintiff George Ikeda is an American citizen of Japanese ancestry. In March 1942, he and his family were driven from their farm in Watsonville, California, forced to abandon their crops, equipment, vehicles, and personal property, and were imprisoned in camps at Salinas, California, and Poston, Arizona. The prison camps were miserable and demoralizing, and deprived him of every right of his citizenship. He was violently assaulted and humiliated by a police officer, who claimed that "these damn Japs" should be "sent to the front lines." The United States in fact subsequently tried to induct Plaintiff Ikeda and other Japanese Americans in the prison camps into combat service. Plaintiff Ikeda responded that because of United States' actions against him, he was a man without

a country and he refused to be inducted. By February 1945, however, he was no longer able to tolerate the conditions in the camps, and so agreed to serve, and did serve, in the U.S. Navy. Due to United States actions against him, Plaintiff Ikeda has suffered severe physical injury, mental anguish, and loss of his rights, without full and fair compensation as accorded by law.

33. Plaintiff Theresa Takayoshi is an American citizen of Japanese ancestry. In early 1942 she owned an ice cream parlor with her husband in Seattle, Washington, where they earned about $500 per month. In May 1942, she and her family, all second and third generation Americans, were forcibly uprooted from their home and business, and incarcerated in a detention camp at Puyallup, Washington, solely on account of their Japanese ancestry. They lost over $10,000 in business assets, good will, and personal belongings. In the camp, she and her husband were paid wages of $12 to $19 per month, which they used to try to provide their family with warm clothes for the harsh winters. Plaintiff Takayoshi and others were told that if their men did not volunteer for the 442nd RCT, they would never get out of the camps. Accordingly, she helped recruit the younger men for the Army, and her own husband served in the 442nd RCT. Defendant has failed to provide Plaintiff Takayoshi redress for these grievous actions against her.

34. Tomeu Takayoshi, deceased, was an American citizen of Japanese ancestry who is here represented by his widow, Plaintiff Theresa Takayoshi. In early 1942, Mr. Takayoshi and his family were forced into prison camps at Puyallup, Washington and Minidoka, Idaho. There he was daily subjected to inhumane conditions and deprivations of his most cherished constitutional rights. He suffered permanent disability due to inadequate medical care in the camps. He saw his son become gravely ill from food poisoning in the camps; when Mr. Takayoshi sought to inquire as to his condition, he was threatened and assaulted by armed camp

officials. He was further threatened that if he didn't "volunteer" for combat duty, he might never get out of the camps. Accordingly, he served in the 442nd RCT, until he was discharged for medical injuries. Due to defendant's actions against him, Mr. Takayoshi suffered great loss of liberty, property, and reputation, without full or fair compensation for these grave personal injustices.

35. Plaintiff National Council for Japanese American Redress is an organization dedicated to the judicial redress of deprivations of constitutional rights and other injuries inflicted upon persons of Japanese ancestry as a result of United States actions during World War II. The Council includes Americans of Japanese ancestry, and friends and descendants of such persons, who seek redress for the segregation, arrest, exclusion, imprisonment, and other losses of liberties inflicted on plaintiffs during World War II solely because of their race and national ancestry.

DEFENDANT

36. Defendant United States of America, by Executive Orders, military orders, and other related actions, subjected plaintiffs to forcible segregation, arrest, exclusion, imprisonment, and other losses of their liberties without lawful or rational reason, solely on the basis of their Japanese ancestry.

CLASS ACTION ALLEGATIONS

37. The individual named plaintiffs sue on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class consists of approximately 120,000 American citizens and American residents of Japanese ancestry, or descendants of such persons no longer living, who were subjected to forcible segregation, arrest, exclusion, imprisonment or other restrictions pursuant to Presidential Proclamation 2525, Executive Order 9066, or other orders

or actions by the United States, its officers, agents, and employees.

38. This class of 120,000 persons is so numerous that joinder of all members is impractical, indeed, impossible. A class action is the only effective device for adjudicating their claims.

39. As hereinafter alleged, there are questions of law and fact common to the class. These questions relate to the illegality of defendant's forcible segregation, arrest, exclusion, and imprisonment of the plaintiff class; to evidence in defendant's possession clearly attesting to the loyalty of the plaintiff class; and to defendant's past and continuing misrepresentations and suppression of that evidence in order to conceal its unlawful basis, *i.e.*, solely on the basis of Japanese ancestry, and caused injuries and deprivations of rights common to the class.

40. The named plaintiffs assert claims typical of those of the class. Named plaintiffs were subjected to the same arbitrary actions, and suffered injuries and deprivations of rights similar to those suffered by other members of the class.

41. Named plaintiffs, with their undersigned counsel, will diligently and fairly protect the interests of the class and will insure full and fair hearing of the common issues of law and fact.

42. This suit is properly maintainable as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, subsections (b)(1), (b)(2), and (b)(3), as follows:

(b)(1) The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for the defendant. Adjudications with respect to individual members of the class might as a practical matter be dispositive of the interests of other

members not parties to the adjudications, or substantially impair or impede their ability to protect their interests.

(b)(2) Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and other relief with respect to the class as a whole, inasmuch as defendant segregated, excluded, imprisoned, and in other ways deprived fundamental rights of the class solely on the basis of their race and national ancestry, without regard to individual characteristics. Likewise, the defendant's continuing misrepresentations and suppression of evidence are directed to the class and not to any individual member.

(b)(3) Questions of law and fact common to the members of the class predominate over any question affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy, inasmuch as:

(1) Due to the complex historical and legal proof required in this action, individual class members would have little ability or interest in individually controlling the prosecution of separate actions, whereas the class action format provides similarly-situated individuals the ability to unite in the efficient and orderly prosecution of their claims.

(2) No prior class action has been brought for similar declaratory and compensatory relief. The few individual claims or defenses against the United States raised contemporaneously with the wartime actions alleged herein were denied or lost due to the defendant's affirmative misrepresentations, suppressions of evidence, and other conspiracies alleged herein, which precluded any fair hearing or redress to all members of the class.

(3) It is highly desirable to concentrate the class members' claims in the instant forum for reasons of judicial economy and cost savings for all litigants. Most of the

crucial military, executive, legislative, and judicial actions herein alleged occurred in the District of Columbia, where this suit is brought. Massive documentary data on U.S. actions against the plaintiff class is also located in the National Archives, in Washington, D.C. The arrests, segregation, exclusion, and imprisonment herein alleged took place in well over a dozen states and territories, necessitating the choice of a single forum for the efficient prosecution of claims on behalf of the class.

(4) This case will be a manageable class action, inasmuch as the class members' identities are ascertainable from detailed archival records of the prison camps held by defendant, principally in Washington, D.C. Notices and communications can flow to members of the class through Japanese American newspapers, organizations, and other cultural networks, and there is a cohesive, stable organization, *i.e.*, the Plaintiff National Council for Japanese American Redress, to assist the court and class members in proceeding with the present action.

FACTUAL ALLEGATIONS

43. Following the outbreak of World War II, defendant maliciously and unlawfully conspired to and did deprive plaintiffs of their constitutional rights by subjecting them to forcible segregation, arrest, exclusion, and imprisonment solely on the basis of their Japanese ancestry. Defendant intentionally concealed and misrepresented the illegal nature of its actions by fabricating claims of "military necessity."

44. The wartime actions alleged herein followed years of racial hostility and invidious discrimination imposed on plaintiffs by defendant the United States and other public officials. For example, the United States had enacted discriminatory legislation prohibiting Japanese immigrants from becoming naturalized U.S. citizens and, beginning in 1924, had prohibited any further immigration from Japan

altogether.[1] By law and/or custom in the West Coast states, many Japanese-Americans were subjected to segregation, exclusion, or restriction from employment, housing, business practices, and public schools. The Issei,[2] or Japanese immigrants who were denied U.S. citizenship, suffered particularly harsh discrimination, including prohibitions on ownership and use rights of land.

45. More than one year before the outbreak of the war, proposals were made at the highest levels of the United States government that "concentration camps" should be built for imprisoning plaintiffs in the event of "trouble" and in order to "impress" the Imperial Japanese government about the seriousness of our preparations for war. (*See*, Memorandum from Secretary of Navy Knox to President Roosevelt, dated October 9, 1940, copy attached as Exhibit A; Memorandum from President Roosevelt to Chief of Naval Operations, August 10, 1936, copy attached as Exhibit B). By information and belief, immediately prior to the war, high officials of the United States government sought the names and addresses of all persons of Japanese ancestry in the United States, and breached the confidentiality of Census Bureau records, for the purpose of planning certain reprisals or taking discriminatory action against these persons. *Personal Justice Denied*, pp. 104-5, fn.

46. During this same time, however, United States agencies and officials responsible for domestic security consistently reported that in the event of war between the United States and Japan, normal security measures would be adequate to identify and control potentially dangerous

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[1] See 8 USC §703, Immigration Act of 1924; 43 Stat. 161. The discriminatory naturalization law was not repealed until 1952.

[2] The first generation, or immigrants, are referred to as "Issei;" their American-born children (U.S. citizens) are the "Nisei;" the Nisei's children are referred to as "Sansei."

persons of Japanese ancestry. Further, they stated it would be unnecessary and potentially dangerous to apply security measures to an entire race or nationality group without regard for the loyalty or citizenship of the individuals involved.

47. Prior to World War II, the FBI and the Office of Naval Intelligence ("ONI") shared primary responsibility for identifying and monitoring civilians of Japanese ancestry who were believed to be dangerous to the United States in the event of war; the War Department had no such responsibility.

48. The FBI maintained lists of persons of Japanese ancestry who were thought to be *potentially* dangerous to the national security. These lists were broadly drawn and identified approximately 2,000 persons who were "suspect" only because they engaged in activities and occupations such as fishermen, produce distributors, Shinto and Buddhist priests, influential businessmen, Japanese language instructors, martial arts instructors, travel agents, Japanese newspaper editors, and recent travelers to Japan.

49. Prior to the United States' entry into World War II, the FBI and ONI had ascertained the identities of all persons who might act as agents on behalf of the Japanese Government, by prior intelligence gathering activities and by means of a secret break-in at the Japanese Consulate in Los Angeles in March, 1941. As a result of these activities, the FBI and ONI undertook surveillance of this limited number of potentially dangerous persons, but this investigation did *not* produce any evidence of potential espionage or sabotage activities by Americans of Japanese ancestry.

50. In November 1941, a comprehensive and confidential report on the loyalty of Americans of Japanese ancestry was sent to President Roosevelt and, by express request of the President, also to Secretary of War Henry L. Stimson. This report was authored by Curtis B. Munson, on

detail to the U.S. State Department, and was based on extensive discussions with FBI and ONI intelligence officials, as well as British Intelligence. In this report, Munson concluded:

> "There is no Japanese 'problem' on the Coast. There will be no armed uprising of Japanese. . . For the most part the local Japanese are loyal to the United States or, at worst, hope that by remaining quiet they can avoid concentration camps or irresponsible mobs. We do not believe that they would be at least any more disloyal than any other racial group in the United States with whom we went to war."

Excerpts of said report are attached hereto as Exhibit C.

51. On December 7, 1941, Imperial Japanese forces attacked Pearl Harbor. The United States subsequently declared war on Japan, Germany, and Italy.

52. Simultaneously with the attack and declaration of war, President Roosevelt issued Presidential Proclamation No. 2525, 6 Fed. Reg. 6321. This Proclamation declared *all* United States residents of Japanese nationality to be "alien enemies," regardless of their demonstrated loyalty to the United States, and authorized the Attorney General to regulate their conduct and to apprehend summarily and such persons "deemed dangerous to the public peace or safety of the United States."

53. Immediately following the Pearl Harbor attack, agents and employees of the United States, acting pursuant to Presidential Proclamation No. 2525, arrested and incarcerated the approximately 2,000 so-called "potentially disloyal" persons of Japanese ancestry on the FBI lists. The defendant further imposed stringent curfew, contraband and travel restrictions, and reporting regulations on all other "alien enemies."

54. The United States arrested and incarcerated these persons without issuance of warrants according to law, without notice of any charges against them, and without provision of a trial to determine their guilt or innocence of any criminal acts. These persons were incarcerated at numerous "internment camps" or other detention facilities operated by the Department of Justice. Many of these persons were incarcerated for the duration of the war, some for periods of five or more years, without legal process or proof of any individual wrongdoing.

55. On January 26, 1942, a confidential report on the "Japanese Question" was issued to the Assistant Secretary of War, The Attorney General, and on information and belief to President Roosevelt. This report was authored by the ONI expert on Japanese intelligence matters, Lt. Commander Kenneth D. Ringle. Ringle concluded that most Americans of Japanese ancestry could be expected to be loyal to the United States in the event of war with Japan, and that the few individuals believed to be potentially dangerous were already known and under control by the FBI. The report noted that "the entire 'Japanese problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people, should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis." A copy of this report is attached as Exhibit D.

56. The War Department's own intelligence office issued confidential intelligence reports throughout the war, stating that Japan's knowledge of the United States military defenses and status was gained not through post-Pearl Harbor activities of Japanese-Americans, but through prewar activities of accredited diplomatic, military, and naval attaches.

57. Beginning with the attack on Pearl Harbor and continuing throughout the war, the Federal Communications Commission (FCC) had responsibility for identifying and

investigating every report of alleged illegal radio use and signaling. The FCC provided weekly reports to the War Department and other federal officials throughout the war, consistently confirming that there was no evidence of illegal signaling or radio-activities by Americans of Japanese ancestry prior to and during the war. A summary of these FCC activities and findings was provided in a letter dated April 4, 1944, from FCC Chairman James L. Fly to Attorney General Francis Biddle, attached as Exhibit E.

58. In the weeks following the Pearl Harbor attack, the United States unlawfully conspired to violate plaintiffs' constitutional rights, with certain federal officials, including John J. McCloy (then Assistant Secretary of War), Lieutenant General John L. DeWitt (then Commanding General of the Western Defense Command and Fourth Army), Colonel Karl R. Bendetsen (then Assistant Chief of Staff for Civil Affairs, Western Defense Command and Fourth Army), certain state officials, and other persons. The object of this unlawful conspiracy was to exile and imprison the entire plaintiff class on the basis of unfounded and patently racist claims that plaintiffs were engaging in numerous acts of espionage and sabotage, that plaintiffs had a racial affinity toward commission of such acts, and that defendant assertedly was unable to distinguish loyal from disloyal persons of Japanese ancestry. *Personal Justice Denied*, pp. 72-92. In flagrant disregard of the defendant's authoritative intelligence information summarized above, and the lack of any disloyal acts by plaintiffs, defendant proceeded to act in furtherance of the unlawful conspiracy, as hereinafter described.

59. In deliberate disregard of plaintiffs' established constitutional rights, defendant unlawfully and maliciously conspired with certain federal and state officials and other persons to design, develop, and implement a plan of exclusion which, while facially neutral, gave defendant absolute discretion in excluding plaintiffs arbitrarily from any designated areas, solely on the basis of their race and

without regard to an affected individual's demonstrated loyalty or United States citizenship. On February 3, 1942, General DeWitt informed John J. McCloy of the public clamor for mass exclusion of Americans of Japanese ancestry on the West Coast:

> The Governor [of California] said yesterday, I sat on the sidelines . . . that if something isn't done and done very promptly, why in certain sections of the state they're going to take it into their own hands. . .
>
> It's the idea of the state authorities, and it's their idea only . . . [I]f they [the Japanese-Americans] are allowed to remain where they are, we are just going to have one complication after another, because you just can't tell one Jap from another. They all look the same.

McCloy responded with a scheme that purportedly would give "legal" validity to the racist conspiracy:

> You see, then we cover ourselves with the legal situation . . . because in spite of the constitution you can eliminate from any military reservation, or any place that is declared to be in substance a military reservation, anyone—any American citizen, and we could exclude everyone and then by a system of permits and licenses permitting those to come back into that area who were necessary to enable that area to function as a living community. Everyone but the Japs.

See excerpts of telephone conversation between General DeWitt and John J. McCloy, dated February 3, 1942, attached as Exhibit F.

60. Defendant intentionally failed to take any actions to halt or dispel the racial hysteria and false rumors on the West Coast, and instead capriciously decided to place the full power and authority of the federal government behind

a scheme of invidious racial discrimination. The "Final Recommendation" for this plan, which recommendation was promptly approved and implemented by defendant, relied in large part on the following statement by the Commanding General:

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted. . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted actions at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

See Memorandum from General DeWitt to the Secretary of War, dated February 14, 1942 (As contained in defendant's *Final Report: Japanese Evacuation from the West Coast - 1942*, p. 34), attached hereto at Exhibit G. Despite pleas from Attorney General Biddle and others for government actions affirming the loyalty and civil rights of Americans of Japanese ancestry, defendant maliciously adopted a plan for their mass removal and imprisonment.

61. As a result of the afore-described conspiracy by defendant with certain federal and state officials and other persons, on February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, authorizing the Secretary of War (or a designated Military Commander):

> whenever he deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he . . . may determine,

> from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.

Said Executive Order, hereinafter referred to as "EO 9066," is attached as Exhibit H. The following day, Secretary of War Henry L. Stimson appointed General DeWitt as the military commander authorized to issue orders pursuant to EO 9066 in the "Western Defense Command," a theatre of combat operations consisting of the eight westernmost states and the territory of Alaska.

62. Acting pursuant to EO 9066, defendant, beginning in March 1942, imposed stringent curfews, reporting requirements, travel and contraband restrictions, and other losses of liberty on plaintiffs, solely because of their Japanese ancestry and without regard for U.S. citizenship. Plaintiffs were required to be in their residences between the hours of 8:00 p.m. and 6:00 a.m.; at all other times they were required to be at their place of employment or within five miles of their place of residence, regardless of family needs, business requirements, or emergencies. Numerous items of common personal property - cameras, radio sets, and firearms—were declared to constitute "contraband," and were subjected to summary seizure. Any plaintiff who changed his or her place of residence was required to notify defendant of the address of his or her new residence. Defendant further notified plaintiffs that they were to be excluded from the West Coast and encouraged them to abandon their residences "voluntarily" and move to the inland states, where they were purportedly to be "resettled." *Personal Justice Denied*, pp. 100-1.

63. On March 18, 1942, the War Relocation Authority was established pursuant to Executive Order 9102, 7 Fed.

Reg. 2165, to administer defendant's program of so-called "relocation" of the plaintiff class from the West Coast, but the War Department retained direct control over decisions affecting curfew, exclusion, imprisonment, and other restrictions imposed on the plaintiff class.

64. The Congress promptly enacted Public Law No. 503, 56 Stat. 173, authorizing the arrest, fine, and imprisonment of anyone found violating any military order issued pursuant to EO 9066, without any consideration of the lack of factual justification for the military's orders, or the civil rights of plaintiffs.

65. Contrary to its previous suggestions that plaintiffs voluntarily leave the West Coast, on or about March 27, 1942, defendant abruptly prohibited any further departures by plaintiffs from the West Coast, and announced and began the implementation of its scheme of forcible exclusion of all persons of Japanese ancestry from the West Coast states of California, Oregon, Washington, and Arizona, pursuant to the aforedescribed conspiracies to violate plaintiffs' constitutional rights.

66. Defendant expelled plaintiffs from their homes and communities on very short notice, sometimes as short as 48 hours, without providing plaintiffs any information as to where they were being sent or for how long they would be gone. Defendant misrepresented to plaintiffs that adequate housing, employment, and essential services would be available to them in their new residences. Defendant further compelled plaintiffs to leave their homes with only the clothing, personal, and household necessities they they could carry in their hands. A copy of a typical Civilian Exclusion Order, directing plaintiffs' expulsion, is attached hereto as Exhibit I.

67. Pursuant to its malicious conspiracy to deprive plaintiffs of their rights, defendant forced plaintiffs to seek sale, storage, or management of their property within a period of a few days or weeks, causing substantial or

complete loss of plaintiffs' property in most cases. Defendant further misrepresented that it would assist plaintiffs in protecting their property, but then failed to provide adequate management, sales, insurance, or storage services, and warned plaintiffs that any property placed in defendant's custody would be stored "at the sole risk of the owner," Commercial warehouses and insurance companies refused to provide protection for plaintiffs' property, forcing plaintiffs either to abandon their property or sell it at sacrifice prices. Defendant has failed to provide full or fair compensation for plaintiffs' devastating losses of property, caused directly by the events alleged herein. *Personal Justice Denied*, pp. 108-112, 117-133.

68. After driving plaintiffs from their homes, defendant failed to protect plaintiffs' property from known and foreseeable looting, vandalism, and waste, resulting in the destruction and loss of virtually all of plaintiffs' property. Defendant further failed to maintain or protect plaintiffs' valuable agricultural land, or to protect or harvest plaintiffs' crops, in violation of its express promises to plaintiffs. Defendant's wrongful acts caused the loss of valuable crops and income, the reversion of valuable farmland to barren wasteland, and the forfeiture of land and lease rights due to plaintiffs' inability to continue mortgage, tax, and lease payments subsequent to their expulsion and imprisonment. Defendant's failure to protect plaintiffs' property breached duties of reasonable care owed to plaintiffs by defendant, breached implied and express promises by defendant to protect plaintiffs and their property during these actions, and violated plaintiffs' statutory, constitutional, and common law rights.

69. Using military troops with drawn guns and bayonets, defendant forced plaintiffs from their homes onto crowded buses, trucks, and railroad cars, and took them to prison camps surrounded by barbed wire, sentry towers, and armed guards. Defendant subjected plaintiffs to threats and acts of physical violence, arrest, fine, and imprison-

ment for any noncompliance with the orders excluding plaintiffs from their homes and confining them to prison camps.

70. Defendant made only rare exceptions from the exclusion orders; even the sick, disabled, and hospitalized were arrested and imprisoned. Orphanages and mental and medical institutions were raided, with defendant demanding custody of anyone with even the slightest Japanese ancestry. Proof of longstanding loyalty to the United States was ignored; decorated veterans of the U.S. armed forces and leaders of American civic organizations were arbitrarily arrested and imprisoned solely because of their Japanese ancestry. Over 70,000 of these Americans were women, children, elderly and disabled persons against whom the defendant did not even attempt to advance claims that they had any access or ability to carry out illicit activities. Further, approximately 72,000 of those imprisoned were United States citizens, second and third generation Americans due the full rights of citizenship.

71. On August 7, 1942, defendant announced its successful completion of the forcible arrest and imprisonment of all United States citizens and residents of Japanese ancestry from the West Coast.

72. Defendant also conceived, planned, and attempted to implement an unlawful scheme whereby more than 100,000 additional Americans of Japanese ancestry living in the Hawaiian Islands were to be arrested and deported to the leper colony on the island of Molokai or to detention centers on the mainland. The United States, however, was forced to alter that plan due only to the lack of transport ships and the Islands' dependence on the labor of these persons. Nevertheless, over 1500 members of the plaintiff class were arrested without charges and incarcerated in detention camps on Hawaii, located at Sand Island and at Honoululu.Approximately 1900 plaintiffs, mostly United States citizens and their families, were deported to the

mainland, many due solely to defendant's allegation that they were unproductive and undesirable. *Personal Justice Denied*, pp. 268-277. Defendant promised these plaintiffs freedom and employment opportunities on the mainland, and forced them to sign papers waiving any right to sue the United States. However, in violation of its promise, defendant thereafter transferred these plaintiffs directly into prison camps on the mainland, where most of them were incarcerated for the duration of the war.

73. In furtherance of defendant's conspiracy as alleged herein, defendant deliberately and maliciously disguised the true illegal nature of its actions against plaintiffs by use of euphemisms and distorted propaganda. Defendant referred to the plaintiff class as "enemy aliens" and "non-aliens," rather than as "permanent residents" and "United States citizens". The process of forcing plaintiffs from their homes into military custody was called "evacuation," "relocation," or "controlled migration," suggesting voluntary measures taken for plaintiffs' own protection. The areas from which plaintiffs were excluded on account of their race were called "military areas" or "military reservations," although these areas were nothing more than political jurisdictions where anti-Japanese racism was most rampant—covering the entire states of California, Washington, Oregon, and parts of Arizona. The temporary prison camps into which plaintiffs were herded at gunpoint, and housed in animal stalls and other inhumane housing, were called "assembly centers," and described by defendant as "a convenient gathering point . . . where evacuees live temporarily while awaiting the opportunity for orderly planned movement." The barren, inhumane camps in which plaintiffs were imprisoned by armed guards behind barbed wire for periods averaging three years, were publicly referred to by defendant as "relocation centers" and "pioneer communities," although defendant privately acknowledged in inter-office memoranda and correspondence that these were in fact "concentration camps."

Through strict use of these euphemisms, prohibitions on photographs of the camps, and other propaganda, defendant fraudulently concealed the illegal nature of its actions.

74. As an integral part of the 1942 exile of plaintiffs from their homes, defendant first forced most members of the plaintiff class into so-called "assembly centers," which were makeshift prison camps on the West Coast, pending construction of more permanent prison camps for them deep in the interior of the country. The Commission reports the following data on the locations, dates of operation, and maximum population of these temporary prison camps:

Location of Camp	Dates of Operation (1942)	Maximum Population
Fresno, CA	May 6 to October 30	5,120
Manzanar, CA	March 21 to June 2	9,837
Marysville, CA	May 8 the June 29	2,451
Mayer, AZ	May 7 to June 2	245
Merced, CA	May 6 to September 15	4,508
Pinedale, CA	May 7 to July 23	4,792
Pomona, CA	May 7 to August 24	5,434
Portland, OR	May 2 to September 10	3,676
Puyallap, WA	April 28 to September 12	7,390
Sacramento, CA	May 6 to June 26	4,739
Salinas, CA	April 27 to July 4	3,586
Santa Anita, CA	March 27 to October 27	18,719
Stockton, CA	May 10 to October 17	4,271

Tanforan, CA	April 28 to October 13	7,816
Tulare, CA	April 20 to September 4	4,978
Turlock, CA	April 30 to August 12	3,661

Personal Justice Denied, p. 138

75. These temporary prison camps consisted of hastily converted race tracks, fairgrounds, and livestock stables, surrounded by armed guards, where plaintiffs were forced to live in horse stalls, tarpaper shacks, and other facilities unfit for human habitation. There, plaintiffs were subject to overcrowding, poor sanitation, inadequate food, shortages of medical staffing and supplies, and epidemics of food poisoning, tuberculosis, pneumonia, and other diseases, resulting in plaintiffs' death, severe physical injuries, and emotional distress. *Personal Justice Denied*, pp. 135-144.

76. By late 1942, defendant had completed construction of ten permanent prison camps euphemistically referred to by defendant as "relocation centers." Defendant subsequently drove plaintiffs straight from their homes or from the temporary prison camps onto crowded trains bound for the permanent prison camps. Defendant reported the following data on the locations, dates of operation, and maximum populations of the prison camps:

Location	Dates of Operation	Maximum Population
Central Utah, UT ("Topaz")	Oct. 1942 - Oct. 1945	8,300
Colorado River, AZ ("Poston")	June 1942 - Nov. 1945	18,000
Gila River, AZ	Aug. 1942 - Nov. 1945	13,400

Granada, CO	Sept. 1942 - Oct. 1945	7,600
Heart Mountain, WY	Sept. 1942 - Nov. 1945	11,100
Manzanar, CA	June 1941 - Nov. 1945	10,200
Minidoka, CA	Sept. 1942 - Oct. 1945	9,990
Tule Lake, CA	June 1942 - March 1946	18,800
Jerome, AR	Nov. 1942 - June 1944	8,600
Rohwer, AR	Oct. 1942 - Nov. 1945	8,500

U.S. Department of Interior, "The Evacuated People: A Quantitative Description", 1946, p. 18. Defendant also maintained illegal high security incarceration facilities for an unknown number of plaintiffs at so-called "Citizen Isolation Camps" in Moab, Utah and Leupp, Arizona, and at a "stockade" at Tule Lake.

77. These permanent prison camps were situated in uninhabited desert and swamp areas, where plaintiffs were housed in tarpaper barracks and surrounded by barbed wire fencing, armed guards, and sentry towers with searchlights and machine guns or other weaponry aimed toward plaintiffs. Armed military patrols were frequently sent into some of the prison camps to threaten plaintiffs and repress any potential resistance or complaints by plaintiffs concerning conditions in the camps.

78. Plaintiffs lived in daily fear for their lives in the camps, not knowing when or if they would ever be released, or whether they and their families would survive the physical and emotional trauma imposed on them by defendant. Members of the plaintiff class died or were hospitalized as a result of inhumane conditions and inadequate care in the camps and others were senselessly shot

or beaten by defendant's agents, causing death, severe injury, and continuing trauma to plaintiffs. *Personal Justice Denied*, pp. 149-165; 177-180.

79. In the camps, plaintiffs were provided inadequate hygienic and medical supplies, and were subjected to extreme weather conditions, ranging from 120°F to -40°F, without adequate protection from these extreme conditions, causing death, physical injury, and severe emotional distress to members of the plaintiff class. The quality and quantity of food provided to plaintiffs were inadequate and fell below the standards required for prisoners of war by international convention, causing sickness and hardships to plaintiffs. Education offered in the camps was inferior and failed to meet the minimum requirements mandated by state law. The housing construction was designed according to specifications to be used only for temporary housing of seasoned combat units, and was grossly inadequate for the prolonged incarceration of civilians, especially the young, the elderly, the ill, and the disabled.

80. Plaintiffs were subjected to extreme deprivations of liberty and privacy in the camps. Plaintiffs were removed from American society and forbidden as a class to leave the camps or return to their homes for almost 3 years. During these long years, members of the plaintiff class were forced to live in small rooms with eight to twelve persons including strangers as well as family. Plaintiffs were denied all privacy and autonomy in their personal and family affairs, causing family disintegration and destruction of plans for family life and education. Defendant denied plaintiffs any knowledge or control of their destiny, and instead subjected them to indefinite imprisonment and inhumane treatment. These conditions caused plaintiffs severe emotional and physical distress, resulting in numerous suicides, disabilities, and death.

81. While in the camps, plaintiffs were restricted from discussing current political topics, including internal United

States politics, the progress of the war, plaintiffs' treatment by defendant, legal rights, means of redress or resistance to United States actions, and other "controversial" subjects. Plaintiffs who made statements critical of the United States or of their loss of liberty were subjected to harsh punitive measures by defendant, including beatings and indefinite solitary confinement. Group meetings were prohibited unless they were restricted to permissible topics and were conducted in English. Further, plaintiffs were required to give advance notice of group meetings to camp officials, so that a camp official could be present to record all statements made.

82. Defendant maliciously intercepted, censored, and seized many of plaintiffs' letters, packages and publications entering or leaving the prison camps. These actions denied plaintiffs information necessary to the exercise of their constitutional rights, and prohibited them from disseminating information pertaining to the mass injustices herein described.

83. Plaintiffs were restricted in their religious practices and beliefs by the afore-described restrictions on group meetings, on written materials, and on permissible topics for discussion, and were further inhibited in their religious freedom in the camps by numerous punitive measures taken by defendant against followers of Eastern religious beliefs.

84. Defendant deliberately placed the camps in barren areas and exploited plaintiffs' labor. Plaintiffs were forced to work in the camps and in labor crews for the United States' war effort, contrary to standards set by international conventions, and were forced to work to provide necessities for themselves, their families, and the other residents of the camps. Plaintiffs were provided no compensation or grossly inadequate compensation for their labor. When plaintiffs were paid for their work, their wages were $12, $16, or $19 per month - substantially less than weekly wages paid for the same work by persons not of

Japanese descent. This forced labor caused plaintiffs to suffer severe losses of income and liberty.

85. While in the camps, Plaintiffs were subjected to warrantless searches and seizures of their persons and property, interrogation, and other forms of duress by defendant. Persons acting as informants within the camps reported derogatory and false information about plaintiffs, often resulting in defendant's arbitrary punishment of plaintiffs on the basis of these unsubstantiated reports. These actions caused deep fears and distrust among members of the plaintiff class.

86. Defendant deliberately and capriciously denied release from the camps for many admittedly loyal plaintiffs who had asked to leave and who were cleared for release by the FBI, solely because of alleged "unfavorable community sentiment" toward persons of Japanese ancestry. By its acts, omissions, policies, and regulations, defendant denied plaintiffs' release for reasons not related to any legitimate government interest, in violation of plaintiffs' fundamental constitutional rights.

87. Senior officials in the War Department expressly admitted in confidential communications dated as early as April 8, 1943, that there was no military justification for the continued imprisonment of the plaintiff class, and that the only reasons for continuation of plaintiffs' imprisonment were political and social, *i.e.*, invidious racial discrimination against persons of Japanese ancestry. Despite these private admissions, defendant continued to represent publicly that military interests necessitated the continued imprisonment of the plaintiff class until the end of the war. Even when the then-Commanding General of the Western Defense Command urged rescission of the exclusion and imprisonment orders, and insisted that there was no military justification for their continuation, defendant intentionally delayed rescission of the mass exclusion orders until December 1944, for the sole purpose of facili-

tating the President's re-election in November 1944. *Personal Justice Denied*, p. 15.

88. Defendant subjected plaintiffs to "loyalty questionnaires" under extremely stressful and threatening conditions. Plaintiffs were required to state whether they would served on combat duty, wherever ordered, for the United States; and whether they would swear unqualified to the United States and "forswear" any form of allegiance or obedience to the Japanese Emperor. These confrontations caused plaintiffs great anxiety, confusion, and stress, due to the unlawful actions defendant had taken thus far against them, and defendant's threats and authority to take further punitive measures against plaintiffs. The noncitizen permanent resident members of the plaintiffs class were caused extreme anxiety by the questionnaires, which in effect asked them to renounce the only citizenship they had and were permitted to hold, while at the same time defendant continued to treat them as "enemy aliens" subject to arbitrary deportation, and to deny them any citizenship or liberty rights as Americans.

89. Many plaintiffs gave qualified answers to these questionnaires, or questioned the legality of defendant's actions against them, or sought their reinstatement of rights before being subjected to combat service. These persons were subjected to numerous punitive measures including assault, battery, and prolonged imprisonment. Many were designated as "disloyal," and transfered to the prison camp at Tule Lake, California for "segregation." By October 1943, about 15,000 plaintiffs, including families and children of those whom defendant deemed to be "troublesome" or "disloyal," were transferred to the Tule Lake camp for segregation. These plaintiffs were subjected to particularly harsh treatment and prolonged incarceration, were stigmatized as disloyal, were classified as "undesirable aliens" by the Selective Service System, and were subjected to threats and actual losses of citizenship, and deportation.

90. Beginning in January 1943, defendant maliciously subjected plaintiffs in the camps to selective service recruitment, and subsequently to forcible conscription, primarily in racially segregated combat units facing extraordinary battlefield casualties. Defendant imposed harsh punishments on those who refused to serve, including criminal convictions and lengthy prison terms. Despite their arbitrary and unlawful incarceration by the United States, Americans of Japanese ancestry volunteered for military service for the United States at much higher rates than any other group, including Caucasians. Plaintiffs rendered outstanding performance with the 442nd Regimental Combat Team (RCT) in Europe, and in military intelligence in the Pacific. The 442nd RCT, an all-Japanese-American combat unit, suffered the highest causualy rate—three hundred and eighteen (318) percent versus twenty-five (25) percent average—of any U.S. military unit during World War II, and was the single most highly decorated military unit during the entire war. The Japanese-Americans who served in military intelligence in the Pacific were credited with shortening the war against Japan by two years. Despite plaintiffs' exemplary performance in these combat units, defendant continued its mass imprisonment orders against plaintiffs.

91. In furtherance of the racially-motivated conspiracy against the plaintiff class herein described, defendant in 1944 drafted and gained passage of special legislation, Public Law 405, 58 Stat. 677, permitting persons in time of war to "renounce" their U.S. citizenship by affirmative statements. This legislation was implemented against plaintiffs under circumstances of undue influence, duress, coercion, and the severe constitutional deprivations imposed on plaintiffs in the camps. The legislation resulted in the "revocation" of United States citizenship for approximately 5,589 plaintiffs, so-called "renunciants," most of whom were within the segregated population at Tule Lake prison camp. Over 1,100 of these persons were

promptly deported by defendant to Japan for "repatriation." Over 4,000 of these "renunciants" attempted, with only mixed success, to have their "renunciations" invalidated as being procured by fraud and duress.

92. Defendant further subjected certain plaintiffs to forcible deportation and involuntary "repatriation" to Japan, and to repeated threats of such deportation, while plaintiffs were detained in U.S. custody. Pursuant to Presidential Proclamation 2655, 10 Fed. Reg. 8947, issued July 14, 1945, forcible deportation was authorized for all "alien enemies...deemed dangerous to the public peace and safety of the United States." In all, defendant deported over 4,700 plaintiffs to Japan from Tule Lake and Department Justice internment camps, without proper hearings or opportunity for any defense by plaintiffs, and without any demonstration by defendant of the "dangerous" nature of these persons.

93. Recently declassified documents demonstrate that the defendant affirmatively misrepresented and suppressed evidence in its control which attested to plaintiffs' loyalty. Defendant intentionally and capriciously raised false claims in briefs filed in the United States Supreme Court, as well as in lower federal courts, for the purpose of shielding its illegal acts from judicial scrutiny, and denying plaintiffs access to a fair trial and to any form of fair judicial redress for the injuries inflicted on them.

94. In *Hirabayashi v. United States*, the first case challenging the United States' actions to be heard by the Supreme Court, the Director of the Department of Justice's Alien Enemy Control Unit expressly warned the Solicitor General of the United States on April 30, 1943, of the falsity of the government's claims of military necessity for the mass imprisonment of plaintiffs, and further articulated the responsibility of the Department of Justice to bring the true facts to the Court's attention.

> Thus, in one of the crucial points of the case, the Government is forced to argue that individual, selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.
>
> In view of this fact, I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence.

See Memorandum from Edward J. Ennis to Solicitor General Fahy, dated April 30, 1943, attached hereto as Exhibit J.

95. Defendant, in bad faith, excluded from the record of pending court actions the evidence contradicting the so-called "military necessity" for mass imprisonment of plaintiffs, and instead made false representations that disclosure of this evidence would jeopardize national security interests, and that "judicial notice" should be taken of the alleged justification for defendant's improper actions against plaintiffs.

96. Defendant was fully aware that its claims of military necessity were in direct contradiction to the afore-described authoritative intelligence reports and other evidence in its control, and that there was no substantive evidence in support of its claims of a military necessity for plaintiffs' imprisonment. For example, an April 12, 1944 memorandum from the Assistant Director of the Department of Justice Alien Enemy Control Unit to Attorney General Biddle pointed out General DeWitt's knowledge of the falsity of his claims of espionage and sabotage by plaintiffs:

> The letter of April 4 (1944) from Chairman Fly of the Federal Communication Commission . . . suggests not only that many of the facts recited by General DeWitt as justifying the evacuation were incorrect, but that General DeWitt knew them to be false.

See Exhibit K.

97. In furtherance of defendant's conspiracy to deprive plaintiffs' rights on the basis of their race, defendant unethically subjected key attorneys in the Department of Justice (hereinafter "DOJ") to duress and coercion in a concerted effort to have them misrepresent, suppress, and cover up evidence in DOJ's possession demonstrating plaintiffs' loyalty, and in order to deprive plaintiffs of their right to fair judicial proceedings. Defendant intentionally withheld from DOJ attorneys and the FCC the then-confidential *Final Report*[3] of the War Department, which contained numerous misrepresentations which DOJ and the FCC knew were unfounded and untrue. Instead, defendant secretly provided a copy of the *Final Report*, as well as staff assistance, to the State of California in U.S. Supreme Court litigation challenging defendant's actions, in order to present to the Supreme Court patently false claims as to plaintiffs' alleged disloyalty. *See* September 30, 1944 Memorandum from Edward Ennis, Director of the Alien Enemy Control Unit, to Herbert Wechsler, Assistant Gen-

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[3] *Final Report: Japanese Evacuation from the West Coast - 1942*, authored primarily by Col. Bendetsen and Gen. DeWitt, was the War Department's official report on plaintiffs' arrest and imprisonment. Originally issued in April 1943, the *Final Report* and all evidence pertaining to its existence were promptly ordered burned by defendant because the military commander's statements therein pertaining to "military necessity" were so racist and indefensible that defendant feared invalidation of its actions in pending court challenges. Defendant subsequently reissued the *Final Report*, after altering the purported military justification for its actions. *Personal Justice Denied*, pp. 222-3

eral in charge of the War department, attached hereto as Exhibit L.

98. After defendant finally provided DOJ attorneys with limited excerpts torn from the *Final Report*, DOJ attorneys proposed to insert a warning in a footnote in the brief to the Supreme Court in *Korematsu v. United States*, that notified the Court *not to take judicial notice of the "facts" recited in the Final Report*, because those "facts" were in contradiction to evidence known to and views held by DOJ. The War Department, in bad faith, objected to the inclusion of this warning, and caused DOJ attorneys to delete the warning to the Supreme Court about the lack of any factual basis for plaintiffs' mass imprisonment by defendant, resulting in an unfair hearing on defendant's illegal actions.

99. As a result of defendant's aforesaid misrepresentations and suppression of evidence, which misrepresentations the Supreme Court relied on in whole, the Supreme Court issued decisions upholding criminal convictions of persons who challenged the mass curfew and exclusion orders. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944). Defendant subsequently publicized said decisions and other similar decisions adverse to plaintiffs as support for the alleged legal validity of its actions. Until very recently, defendant continued to suppress and cover up the existence of the contrary facts and circumstances indicating the lack of any factual basis for plaintiffs' mass imprisonment and the defendant's actual knowledge of those contrary facts and circumstances, with the intention and purpose of dissuading plaintiffs from asserting judicial claims for redress of the wrongs herein alleged.

100. Defendant pursued a malicious conspiracy of mooting, delaying, and otherwise interfering with legal challenges raised by members of the plaintiff class, in a

concerted effort to deprive plaintiffs of their right to a full and fair judicial determination of the legality of defendant's actions against them.

101. As part of defendant's conspiracy to prevent plaintiffs from adjudicating their legal claims against defendant's actions, defendant intentionally sought numerous delays, raised frivolous procedural disputes, claimed in bad faith that plaintiffs failed to exhaust non-existent administrative remedies, removed plaintiffs from the jurisdiction of the courts, and released selected individual litigants from its custody in order to avoid an adjudication of defendant's illegal conduct. In these and numerous other ways, defendant maliciously prohibited plaintiffs from obtaining a fair judicial hearing on the legality of defendant's actions against the plaintiff class.

102. Defendant acted in furtherance of the aforesaid conspiracy by threatening and intimidating plaintiffs from seeking judicial redress, by threatening to suspend the writ of *habeas corpus*, and threatening to revoke plaintiffs' United States citizenship and residency status. Defendant in fact implemented these threats against certain plaintiffs by revoking their United States citizenship, subjecting them to extended years of imprisonment, and deporting them to Japan. Defendant drafted legislation to revoke plaintiffs' right to *habeas corpus*, but deferred seeking its enactment because defendant succeeded in accomplishing the same purpose by other illicit means; *i.e.*, imprisoning plaintiffs for the duration of the war while preventing them from obtaining judicial relief. A copy of a letter from Col. Bendetsen to Mr. McCloy's staff dated September 13, 1942, forwarding draft legislation intended to suspend the writ of *habeas corpus* for plaintiffs, is attached as Exhibit M.

103. Then one *habeas corpus* petition that was finally heard by the Supreme Court was decided on December 18, 1944, after two and one-half years of delays by defendant, during which time defendant had continued

mass imprisonment and exclusion orders against members of the plaintiff class. In *Ex parte Endo*, 323 U.S. 283 (1944), the Court held that concededly loyal American citizens, such as the petitioner herein, could not be involuntarily detained by defendant. Nevertheless, defendant had succeeded in imprisoning plaintiffs for most of the duration of the war, and in fact continued its physical custody of thousands of plaintiffs for months after that court decision.

104. Although the aforesaid mass exclusion and imprisonment orders were formally rescinded on January 2, 1945, thousands of plaintiffs continued to be imprisoned or barred from returning to their homes due to arbitrary "individual exclusion orders." These orders were issued by defendant simultaneously with the rescission of the mass exclusion orders, but without hearing, probable cause, or recourse by plaintiffs. Further, defendant continued to imprison and punish persons who had attempted to resist, challenge, or disagree with defendant's actions.

105. Defendant effectively barred many plaintiffs from leaving the prison camps because defendant had confiscated or caused destruction of their homes, vehicles, personal property, and life savings, and then did not provide them with adequate funds for transportation, food, or lodging necessary to leave the isolated camps. Due to these and other wrongful acts by defendant, over half of the plaintiff class (approximately 55,000 persons) were still in the physical custody of the United States when Japan surrendered in August 1945, over three years after plaintiffs had been imprisoned. The prison camps were not finally closed until March 1946.

106. Defendant never proved a single act of espionage, sabotage, or other disloyal act by any member of the plaintiff class. No actions similar to those described hereinabove were ever taken by defendant against U.S. citizens and residents of German or Italian ancestry during World War II.

107. Defendant's actions as alleged herein were motivated in large part by racial animus and a bad faith intent to deprive plaintiffs of their fundamental civil and constitutional rights solely on the basis of race and national ancestry. Substantial new evidence indicates that defendant's actions were further based on numerous other improper motives, including but not limited to:

(1) Retaliation against Americans of Japanese ancestry for Japan's attack on Pearl Harbor and mistreatment of Americans in its custody;

(2) Psychological studies and experimentation on the "Oriental Mind" for anthropological and military purposes;

(3) Forced labor for U.S. agricultural needs during the labor shortage and war effort; and

(4) Appeasement of political figures who sought to rid the West Coast of Japanese Americans for their own political, social, and economic gain.

108. There is an actual controversy between plaintiffs and the defendant requiring a declaration by this Court that defendant's actions against the plaintiff class described herein were illegal. The injuries inflicted upon the plaintiff class by defendant have never been formally acknowledged, redressed, or otherwise properly compensated by defendant. The continuing purported validity of defendant's discriminatory actions and defendant's failure to eradicate the effects of those actions have caused and are causing continuing injuries to the plaintiff class, including but not limited to persisting stigma, suspicions of disloyalty, chilling effects on plaintiffs' exercise of their constitutional rights, and other injuries as alleged herein. Defendant's actions further create a real and continuing threat of similar future actions against plaintiffs, as well as other racial or ethnic minority groups. For example, at the Commission's hearings on November 3, 1981, former Assistant Secretary of War John J. McCloy testified that

mass arrests and imprisonment on the basis of race may justifiably recur in the event of future hostilities with other nations, such as Cuba.

109. Since the time of the unlawful actions herein alleged, defendant has continued its conspiracy and actions to deprive plaintiffs of their constitutional rights and redress, by continuing to perpetuate the force and effects of its misrepresentations and suppression of confidential government documents demonstrating the unlawful and patently racist nature of defendant's actions.

110. Numerous documents attesting to defendant's aforesaid continuing conspiracy to deprive plaintiffs of their constitutional rights and to redress for defendant's actions have been recently retrieved, declassified, and made public only as a result of the 1980 Congressional mandate that the Commission on Wartime Relocation and Internment of Civilians study the causes for the wartime internment of persons of Japanese ancestry. The Commission's Report, *Personal Justice Denied* (dated February 24, 1983), confirms numerous instances in which defendant misrepresented the military necessity for its actions, suppressed authoritative intelligence reports attesting to the loyalty of the plaintiff class, and interfered with judicial processes so as to deny any effective means of redress to the plaintiff class. Attached hereto as Exhibit N is the summary chapter of *Personal Justice Denied.*

CAUSES OF ACTION

111. Plaintiffs incorporate by reference the foregoing allegations of their Amended Complaint, and further allege that:

I. DUE PROCESS

112. Defendant's actions pursuant to Executive Orders 9066 and 9102, Presidential Proclamation 2525, and other

actions and orders of the U.S. government as herein alleged, subjected plaintiffs to summary loss of life, liberty, and property, and to deprivation of their most fundamental constitutional, statutory, common law, and human rights, without individualized hearings or the opportunity to be heard, in violation of the Fifth Amendment's guarantee that individuals shall not be deprived of life, liberty, or property without due process of law.

II. EQUAL PROTECTION

113. Defendant's actions pursuant to Presidential Proclamation 2525, Executive Orders 9066 and 9102, and other orders and actions of the U.S. government as herein alleged, by their intent and effect, subjected plaintiffs to deprivations of their civil and constitutional rights solely on the basis of race and national ancestry. These actions were not reasonably related to any legitimate governmental interest, and were not the least restrictive means of implementing any legitimate governmental interest in national security. Defendant's actions constituted invidious discrimination in violation of plaintiffs' right to the equal protection of the law, pursuant to the Fifth Amendment of the United States Constitution.

III. UNJUST TAKING

114. Defendant's actions as herein alleged caused a taking of plaintiffs' private property for public use, in that defendant totally or substantially destroyed plaintiffs' real and personal property, commercial interests, livelihood, reputation, liberty, and other property rights, privileges, and entitlements secured by federal, state, and local law.

115. Defendant has failed to compensate or has provided grossly inadequate compensation for plaintiffs' losses of property rights, in violation of the Fifth Amendment of the United States Constitution.

IV. PROTECTION FROM UNREASONABLE ARREST, SEARCH AND SEIZURE

116. Defendant arrested and imprisoned plaintiffs and searched and seized plaintiffs' property, without probable cause, without issuance of warrants according to law, and without notice of formal charges against plaintiffs, in violation of plaintiffs' right of protection from illegal arrest and unreasonable search and seizure secured by the Fourth Amendment of the United States Constitution.

V. PRIVILEGES AND IMMUNITIES

117. Defendant's actions as herein alleged denied plaintiffs the fundamental rights, privileges, and immunities of citizens of the other states, solely on the basis of plaintiffs' race and national ancestry, in violation of the Privileges and Immunities Clause of the United States Constitution.

VI. RIGHT TO FAIR TRIAL AND REPRESENTATION BY COUNSEL

118. Plaintiffs' arrest, exclusion, and imprisonment, as herein alleged, constituted actual criminal prosecutions, for which defendant denied plaintiffs their rights to a fair trial, notice of any formal charges against them, confrontation of witnesses against them, compulsory process for obtaining witnesses in their favor, assistance of counsel for their defense, and a fair and impartial trial of their guilt or innocence of any wrongdoing, in violation of the Sixth Amendment of the United States Constitution.

VII. PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT

119. Defendant's actions as herein alleged caused plaintiffs wanton and unnecessary infliction of pain, were

grossly disproportionate to any security risks posed by the plaintiff class and, in light of the absence of the commission of any crime by plaintiffs, violated plaintiffs' protection from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

VIII. FREEDOM OF RELIGION

120. Defendant's actions as herein alleged infringed plaintiffs' right to freedom of religion secured by the First Amendment, in that defendant arrested and punished certain plaintiffs on the basis of Eastern religious beliefs attributed to them, and restricted plaintiffs' exercise of their religious beliefs and practices.

IX. FREEDOM OF SPEECH AND PRESS

121. Defendant's actions as herein alleged violated plaintiffs' rights of free speech, expression, and press secured by the First Amendment, in that plaintiffs were punished for any statements critical of the defendant or of their treatment by defendant. Defendant infringed plaintiffs' right to discuss political and other similar topics, restricted plaintiffs' ability to engage in group meetings and to organize for political action, denied plaintiffs access to important written materials, censored plaintiffs' communications, and prohibited plaintiffs from freely speaking and publishing.

X. FREEDOM OF ASSOCIATION

122. Defendant's actions as herein alleged infringed on the plaintiffs' rights of association secured by the First Amendment, by isolating plaintiffs from society in remote racially-segregated prison camps, prohibiting plaintiffs' contact with the rest of American society, severely restricting plaintiffs' right to hold group meetings, to discuss ideas, and to organize for political and cultural purposes, and by subjecting plaintiffs to harsh punitive measures on

the basis of their alleged association with various law-abiding cultural, political, and business organizations.

XI. FREEDOM OF PETITION FOR REDRESS OF GRIEVANCES

123. Defendant, by its actions herein alleged, denied plaintiffs their right to petition for redress of grievances secured by the First Amendment. Plaintiffs who attempted to present grievances to defendant were beaten, assaulted, threatened, locked in stockade cages, tortured, denied food and clothing, and subjected to other life-threatening conditions. Defendant restricted plaintiffs from discussion or political activity that was critical of defendant's actions against them, and threatened plaintiffs with punitive measures and losses of their constitutional rights and citizenship for criticizing United States' actions against them. Defendant further denied plaintiffs' right to petition for redress of grievances by intentionally interfering with judicial processes, by affirmatively misrepresenting and suppressing evidence in defendant's possession relating to the loyalty of the plaintiff class, and by delaying, mooting, and otherwise preventing or interfering with plaintiffs' attempts to obtain a fair judicial determination of the legality of defendant's actions.

XIII. PRIVACY, TRAVEL, AND OTHER CONSTITUTIONAL RIGHTS

124. Defendant's subjection of plaintiffs to prolonged incarceration, degrading treatment, societal ostracism, and invidious racial discrimination caused plaintiffs to suffer egregious losses of their rights to liberty, privacy, autonomy, and interstate travel, in violation of plaintiffs' rights under the United States Constitution.

XIII. PROTECTION FROM INVOLUNTARY SERVITUDE

125. Defendant forced plaintiffs to labor in the prison camps without compensation or for grossly inadequate

compensation, solely on account of plaintiffs' race and national ancestry, in violation to the Thirteenth Amendment of the United States Constitution.

XIV. BILLS OF ATTAINDER AND EX POST FACTO LAWS

126. Defendant's actions against plaintiffs, including Presidential Proclamation 2525, Executive Orders 9066 and 9102, and Public Laws 503 and 405 constituted Bills of Attainder and Ex Post Facto laws against members of the plaintiff class, in violation of Article I, Section 9 of the Constitution of the United States.

XV. DENIAL OF HABEAS CORPUS

127. Defendant denied plaintiffs' right to the writ of *habeas corpus*, in violation of Article I, Section 9 of the Constitution, by delaying and mooting cases, suppressing and misrepresenting evidence, threatening and conspiring to withdraw the writ of *habeas corpus* for the plaintiff class, and otherwise interfering with the administration of justice and with the adjudication of the legality of defendant's actions.

XVI. CONSPIRACY TO DEPRIVE PLAINTIFFS OF THEIR CIVIL RIGHTS

128. By its aforesaid actions, defendant conspired with its officers, employees, and agents and with state and local officials, and authorized and directed a conspiracy among certain of its own officers, agents, and employees, for the purpose of depriving plaintiffs of their civil rights and the equal protection of the laws on the basis of their race and national ancestry, in violation of 42 U.S.C. §§1981, 1983, and 1985-6.

XVII. ASSAULT AND BATTERY

129. Defendant's actions as herein alleged subjected plaintiffs to numerous physical and psychological injuries, fear of imminent bodily harm, and death.

XVIII. FALSE ARREST AND FALSE IMPRISONMENT

130. Defendant's forcible arrest, exclusion, and imprisonment of plaintiffs for periods averaging three or more years was without legal authority or colorable legal claim, and constituted false arrest and false imprisonment.

XIX. ABUSE OF PROCESS AND MALICIOUS PROSECUTION

131. Defendant, by its aforesaid actions, subjected plaintiffs to malicious prosecution and abuse of process without legal authority and in deliberate disregard of established judicial processes and the legal rights of plaintiffs.

XX. NEGLIGENCE

132. Defendant owed plaintiffs a duty of reasonable care in its capacity as custodian of plaintiffs' persons and property because of its actions as herein alleged. Defendant negligently failed to exercise reasonable care to protect plaintiffs' property from loss, destruction, and vandalism during plaintiffs' exclusion and imprisonment. Defendant negligently failed to feed, house, and otherwise care for plaintiffs adequately during their incarceration in the prison camps. Defendant further negligently failed to pursue means within its control for confirming plaintiffs' loyalty and securing plaintiffs' prompt release. These actions caused plaintiffs to suffer death, physical injuries, prolonged incarceration, emotional distress, losses of property, and other injuries, in the past, in the present, and continuing into the future.

XXI. BREACH OF CONTRACT.

133. Defendant secured plaintiffs' cooperation in peacefully leaving their homes, businesses, and property, on the basis of defendant's promises: (1) that plaintiffs would be free to relocate to inland communities, and there pursue normal life, work, and schooling; (2) that defendant would protect plaintiffs and their property during relocation; (3) that plaintiffs would be permitted to return to their homes as soon as the alleged temporary military emergency subsided; (4) and that plaintiffs would not be deprived of their constitutional rights. These and other promises constituted express and implied-in-fact contracts between plaintiffs and defendant, based on numerous press releases, public statements, administrative instructions, orders, brochures, and other written and oral statements issued by defendant to plaintiffs, examples of which are attached hereto as Exhibit O (Press release issued by the Federal Reserve Bank of San Francisco, Evacuee Property Department, March 10, 1942), and Exhibit P ("Questions and Answers for Evacuees", a brochure distributed by WRA, *circa* spring 1942); and Exhibit I (Exclusion Order, ¶2). In reliance on said promises, plaintiffs peacefully complied with the actions ordered by defendant. Defendant, however, violated each of these contractual duties by its actions as alleged herein, causing great losses of life, liberty, and property to plaintiffs.

XXII. BREACH OF FIDUCIARY DUTY

134. Defendant, by statutes, regulations and orders it promulgated and actions as herein before alleged, established a system of comprehensive and pervasive federal control, management, and supervision of every aspect of plaintiffs' daily lives during the period of detention. This system of federal management and control was undertaken pursuant to Presidential Proclamation 2525, Executive Orders 9066, 9102, and 9423, orders of military commanders,

and rules, regulations, and directives of the War Relocation Authority, Wartime Civil Control Administration, the Departments of War, Justice and Interior, the Federal Reserve Bank, the Farm Security Administration, and other agencies of the Federal Government. Under this system of comprehensive management and control the United States assumed the full responsibility of Guardian or Trustee, and placed the Plaintiffs in the position of Wards or Beneficiaries - totally reliant and dependant on the United States for plaintiffs' every need. Pursuant to the referenced regulations and orders, defendant undertook to provide for plaintiffs' food, health care, housing, and education, and to manage and control all aspects of plaintiffs' behavior, including the exercise of constitutional rights. *See, e.g.*, "Principal Obligations Taken on by WRA", from excerpts of "War Relocation Authority Tentative Policy Statement," attached hereto as Exhibit Q. Defendant thereby assumed fiduciary duties toward plaintiffs.

135. By concealing, suppressing and misrepresenting to plaintiffs, the courts, and the Congress, the lack of military necessity for its actions; by manipulating judicial process to deny plaintiffs timely review of the legality of defendant's actions; by failing to abide by its own undertaking to provide adequate food, housing, health care, education, and other protective services for plaintiffs and their property; and by denying plaintiffs the exercise of their constitutional, statutory, and common law rights as enumerated above (Counts I-XXI), defendant breached its fiduciary duties to plaintiffs and is accountable for damages resulting therefrom.

PRAYERS FOR RELIEF

WHEREFORE, named plaintiffs and their class pray for the following relief:

1. That this Court enter an order establishing this action as a class action and permitting named plaintiffs to represent the class described herein.

2. That this Court declare defendant's acts, as herein alleged, to be in violation of plaintiffs' constitutional, statutory, and civil rights, as herein enumerated.

3. That this Court enter judgment against Defendant United States of America for $10,000 for each cause of action for each plaintiff class member herein as to causes of action not sounding in tort.

4. That this Court enter judgment against Defendant United States of America for compensatory damages for each cause of action herein sounding in tort for each plaintiff class member, in such amount as shall be found by the jury upon trial of this action.

5. That this Court award plaintiffs costs, interest, and attorneys' fees for their prosecution of this action, pursuant to 42 U.S.C. §1988.

6. That this Court order such other and further relief as it deems just and proper.

LANDIS, COHEN, SINGMAN AND RAUH

/s/ Benjamin L. Zelenko
Benjamin L. Zelenko

/s/ B. Michael Rauh
B. Michael Rauh

/s/ Ellen Godbey Carson
Ellen Godbey Carson

Attorneys for Plaintiffs

1019 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 785-2020

JURY DEMAND

Please take notice that PLAINTIFFS HEREBY DEMAND TRIAL BY JURY OF SIX PERSONS.

LANDIS, COHEN, SINGMAN AND RAUH

/s/ Benjamin L. Zelenko
Benjamin L. Zelenko

/s/ B. Michael Rauh
B. Michael Rauh

/s/ Ellen Godbey Carson
Ellen Godbey Carson

Attorneys for Plaintiffs

1019 Nineteenth Street, N.W.
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LIST OF EXHIBITS

EXHIBIT	
A	Memorandum from Secretary of Navy Knox to President Roosevelt, October 9, 1940
B	Memorandum from President Roosevelt to Chief of (Naval) Operations, August 10, 1936
C	Report on "Japanese on the West Coast" by Curtis B. Munson, November 1941
D	Report on the Japanese Question by Lt. Commander Kenneth D. Ringle, U.S. Navy, January 26, 1942
E	Letter from FCC Chairman James L. Fly to Attorney General Francis Biddle, April 4, 1944

F Transcript of Telephone Conversation between General DeWitt and Assistant Secretary of War McCloy, February 3, 1942

G Memorandum from General DeWitt to the Secretary of War ("Final Recommendation"), February 14, 1942

H Executive Order 9066, February 19, 1942

I Civilian Exclusion Order No. 5, April 1, 1942

J Memorandum from Edward Ennis (Director, DOJ Alien Enemy Control Unit) to Solicitor General Fahy, April 30, 1943

K Memorandum from John Burling (Assistant Director, DOJ Alien Enemy Control Unit) to Attorney General Biddle, April 12, 1944

L Memorandum from Edward Ennis to Herbert Wechsler (Assistant Attorney General in charge of the War Department), September 30, 1944

M Letter from Col. Karl Bendetsen to Office of the Assistant Secretary of War, September 13, 1942

N *Personal Justice Denied*, Commission on Wartime Relocation and Internment of Civilians, issued February 24, 1983. Summary chapter (pp. 1-18)

O Press Release, issued by Evacuee Property Department, of the Federal Reserve Bank of San Francisco, March 10, 1942

P War Relocation Authority, *Questions and Answers for Evacuees* (circa 1942)

Q War Relocation Authority Tentative Policy Statement (excerpts) May 29, 1942

EDWARD J. ENNIS REPLY TO:

Exhibit J

Department of Justice

Alien Enemy Control Unit

Washington

April 30, 1943

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Japanese Brief

Last week with our draft of the *Hirabayashi* brief I transmitted to Mr. Raum some material which I thought he would find helpful in obtaining a background view of the context of this case. In particular, I sent him a copy of Harpers Magazine for October 1942, which contains an article entitled *The Japanese in America, The Problem and Solution*, which is said to be by "An Intelligence Officer". Without attempting to summarize this article, it stated among other things that:

1. The number of Japanese aliens and citizens who would act as saboteurs and enemy agents was less than 3,500 throughout the entire United States.

2. Of the Japanese aliens, "the large majority are at least passively loyal to the United States".

3. "The Americanization of Nisei (American-born Japanese) is far advanced."

4. With the exception of a few identified persons who were prominent in pro-Japanese organizations the only important group of dangerous Japanese were the Kibei (American-born Japanese predominantly educated in Japan).

5. "The identity of Kibei can be readily ascertained from United States Government records."

6. "Had this war not come along at this time, in another ten or fifteen years there would have been no Japanese problem, for the Issei would have passed on, and the Nisei taken their place naturally in American communities and national life."

This article concludes: "To sum up: The 'Japanese Problem' has been magnified out of its true proportion largely because of the physical characteristics of the Japanese people. It should be handled on the basis of the *individual*, regardless of citizenship and *not* on a racial basis." (Emphasis in original.)

I though this article interesting even though it was substantially anonymous. I now attach much more significance to it because a memorandum prepared by Lt. Com. K. D. Ringle, who has until very recently been Assistant District Intelligence Officer, 11th Naval District, in charge of naval intelligence in that district (which includes Los Angeles), and who was formerly Assistant District Intelligence Officer in Hawaii, has come to my attention. A comparison of this memorandum with the article leaves no doubt that the author of the Harpers article is Lt. Com. K. D. Ringle. There are many long passages in the first person relating to personal experiences which are identical in the two writings.

In addition, I am informed entirely unofficially by the persons in the Office of Naval Intelligence that Lt. Com. Ringle in fact was lent to War Relocation Authority to prepare a manual on the background of the Japanese who were being evacuated from an Intelligence or security viewpoint, for the use of the WRA personnel. After this memorandum was prepared permission was obtained to abstract it and publish it anonymously in Harpers. Thus the Harpers article, which clearly indicates that the method of evacuation was wrong and that it would have been sufficient to evacuate not more than 10,000 known Japanese and that it would now be safe to release all but not

more than 10,000 presently identified Japanese, was written by a Naval Intelligence officer who was on duty from 1940 until very recently in the Los Angeles area, from which approximately one-third of the evacuation came.

I have furthermore been most informally, but altogether reliably advised that both the article and the WRA memorandum prepared by Lt. Com. Ringle represent the views, if not of the Navy, at least of those Naval Intelligence officers in charge of Japanese counter-intelligence work. It has been suggested to me quite cearly that it is the view of these officers that the whole evacuation scheme was carried on very badly and that it would have been sufficient to evacuate the following three groups:

1. The Kibei.
2. The parents of Kibei.
3. A known group of aliens and citizens who were active members of pro-Japanese societies such as the Japanese Navy League, the Military Virtue Society, etc.

Since the naval officers believe that it was necessary to evacuate only about 10,000 people they could have identified by name, they did not feel that it was necessary to evacuate all of the Japanese. Presumably, they did not make this view known fourteen months ago for the reasons that Secretary Knox was at that time greatly exercised about the Japanese Fifth Column and that, since it was the Army's problem, it was safer to keep quiet than to brave the political storm then raging.

In retrospect it appears that this Department made a mistake fourteen months ago in not bringing the Office of Naval Intelligence into the controversy. I suppose that the reason that it did not occur to any of us to do this was the extreme position then taken by the Secretary of the Navy.

To have done so would been wholly reasonable, since by the terms of the so-called delimitation agreement it

was agreed that Naval Intelligence should specialize on the Japanese, while Army Intelligence occupied other fields. I have not seen the document, but I have repeatedly been told that Army, before the war, agreed in writing to permit the Navy to conduct its Japanese intelligence work for it. I think it follows, therefore, that to a very considerable extent the Army, in acting upon the opinion of Intelligence officers, is bound by the opinion of the Naval officers in Japanese matters. Thus, had we known that the Navy thought that 90% of the evacuation was unnecessary, we could strongly have urged upon Gen DeWitt that he could not base a military judgment to the contrary upon Intelligence reports, as he now claims to do.

Lt. Com. Ringle's full memorandum is somewhat more complete than the version published in Harpers and I think you will be interested in reading it. In the past year I have looked at great numbers of reports, and memoranda, and articles on the Japanese, and it is my opinion that this is the most reasonable and objective discussion of the security problem presented by the presence of the Japanese minority. In view of the inherent reasonableness of this memorandum and in view of the fact that we now know that it represents the view of the Intelligence agency having the most direct responsibility for investigating the Japanese from the security viewpoint. I feel that we should be extremely careful in taking any position on the facts more hostile to the Japanese than the position of Lt. Com. Ringle. I attach the Department's only copy of this memorandum

Furthermore, in view of the fact that the Department of Justice is now representing the Army in the Supreme Court of the United States and is arguing that a partial, selective evacuation was impracticable, we must consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable. It is my opinion that certainly one of the most

difficult questions in the whole case is raised by the fact that the Army did not evacuate people after any hearing or on any individual determination of dangerousness, but evacuated the entire racial group. The briefs filed by appellants in the Ninth Circuit particularly pressed the point that no individual consideration was given, and I regard it as certain that this point will be stressed even more, assuming that competent counsel represent appellants, in the Supreme Court. Thus, in one of the crucial points of the case the Government is forced to argue that individual, selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.

In view of this fact, I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence.

As I have said, my information that the Ringle memorandum represents the view of the Office of Naval Intelligence has come to me informally. I feel, therefore, that we have an obligation to verify my informal information. I believe that we should address an inquiry to the Secretary of the Navy, making reference to the Ringle memorandum, and stating that we have been advised that this represents the Navy's view and asking the Secretary if in fact the views of ONI, at the time of the evacuation, coincided with Com. Ringle's.

The Ringle memorandum originally came into my possession from WRA and we noticed the parallel between the memorandum and the article in this office. Attorneys for WRA furthermore are among the persons who have advised us that the Ringle memorandum represents the

official Navy view. In view of the fact that any other information which I have obtained is highly confidential, I would prefer to refer in a letter to Secretary Knox only to WRA.

I have prepared for your consideration a draft of a letter which you might wish to send to Mr. Knox.

/s/ Edward J. Ennis
Director, Alien Enemy Control Unit

Attachment

Exhibit K

Department of Justice

Alien Enemy Control Unit

Washington

April 12, 1944

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Letter from Federal Communications Commission on alleged Japanese radio signals

The letter of April 4 from Chairman Fly of the Federal Communications Commission pertaining to General DeWitt's allegations that there were hundreds of interceptions of unidentified radio signals on the West Coast, particularly in the light of Mr. Hoover's earlier memorandum to you on the same subject, suggests not only that many of the facts recited by General DeWitt as justifying the evacuation were incorrect, but that General DeWitt knew them to be false. It appears that FCC was in constant communication with his headquarters and advised him that there were no radio signals which they could not identify and that General DeWitt nevertheless reported the existence of such signals in a formal report to the Secretary of War made public by the War Department.

I have been told that the Secretary of the Interior is presently looking into the whole Japanese problem himself and that the question of permitting some American citizens of Japanese ancestry now to return to the Pacific Coast may well arise before long. Under these circumstances I think it would be of value for Mr. Ickes to be as familiar as possible with the kind of problem which he has inherited and, for this reason, I recommend that copies of Mr. Fly's letter and memorandum be furnished him.

I annex a proposed letter for this purpose.

Respectfully,

/s/ JOHN L. BURLING
JOHN L. BURLING

Attachments

Exhibit L

Department of Justice

Alien Enemy Control Unit

Washington

September 30, 1944

MEMORANDUM FOR MR. HERBERT WECHSLER

Re: *Korematsu* v. *United States*

I understand that the War Department is currently discussing with the Solicitor General the possibility of changing the footnote in the Korematsu brief in which it is stated that this Department is in possession of information in conflict with the statements made by General DeWitt relating to the causes of the evacuation. Mr. Burling and I feel most strongly that three purposes are to be served by keeping the footnote in its present form. (1) This Department has an ethical obligation to the Court to refrain from citing it as a source of which the Court may properly take judicial notice if the Department knows as to other statements that there is such contrariety of information that judicial notice is improper. (2) Since the War Department has published a history of the evacuation containing important misstatements of fact, including imputations and inferences that the inaction and timidity of this Department made the drastic action of evacuation necessary, this Department has an obligation, within its own competance, to set the record straight so that the true history may ultimately become known. (3) Although the report deals extensively with the activities of this Department and with the relationship of the War Department to this Department, the report was published without its being shown to us. In addition, when we learned of its existence, we were on one occasion advised that the report would never be published and, on another occasion when we asked that release be held up so that we could consider

it, we were told that the report had already been released although in fact the report was not released until two weeks thereafter. In view of the War Department's course of conduct with respect to the report, we are not required to deal with the report very respectfully.

I

As to the propriety of taking judicial notice of the contents of the report, it will be sufficient to point out that (1) the report makes an important misstatement concerning our published alien enemy procedures; (2) the report makes statements concerning radio transmissions directly contradicted by a letter from the Federal Communications Commission, and (3) the report makes assertions concerning radio transmission and ship-to-shore signaling directly contradicted by a memorandum from the Federal Bureau of Investigation.

II

The wilful historical inaccuracies of the report are objectionable for two different reasons. (1) The chief argument in the report as to the necessity for the evacuation is that the Department of Justice was slow in enforcing alien enemy control measures and that it would not take the necessary steps to prevent signaling whether by radio or by lights. It asserts that radio transmitters were located within general areas but this Department would not permit mass searches to find them. It asserts that signaling was observed in mixed occupancy dwellings which this Department would not permit to be entered. Thus, because this Department would not allow the reasonable and less drastic measures which General DeWitt wished, he was forced to evacuate the entire population. The argument is untrue both with respect to what this Department did and with respect to the radio transmissions and signaling, none of which existed, as General DeWitt at the time well knew.

(2) The report asserts that the Japanese-Americans were engaged in extensive radio signaling and in shore-to-ship signaling. The general tenor of the report is not only to the effect that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them.

III.

As to the relations of this Department to the report, the first that we knew of its existence was in April, 1942, when we requested Judge Advocate General Cramer to supply any published material in the War Department's possession on the military situation on the West Coast at the time of the evacuation to be used in the Hirabayashi brief in the Supreme Court. Colonel Watson, General DeWitt's Judge Advocate, stated that General DeWitt's report was being rushed off the press and would be available for consideration. I was then advised, however, that the printed report was confidential and I could not see it but I was given 40 pages torn out of the report on the understanding that I return them which, unfortunately, I have done. Because these excerpts misstated the facts as I knew them and misstated the relations between the Department of Justice and the War Department, I suggested to the Solicitor General that he might wish to discuss with the Attorney General the matter of the Attorney General taking up with the Secretary of War the question of showing us this report before it was released. Colonel Watson then advised me that Mr. McCloy was treating the report as a draft and my personal recollection is that Mr. McCloy stated in Mr. Biddle's presence that it was not intended to print this report. We did not hear about this report again until over six months later when I learned accidentially from Mr. Myer of WRA that he had a copy of the

report which the War Department was going to publish. I borrowed his copy and then Mr. Burling called Captain Hall, Mr. McCloy's Assistant Executive Officer, and pointed out to him that the report undertook to discuss relations between the War and Justice Departments without giving us a chance to examine it and it was my understanding that Mr. McCloy did not intend to have the report released. Captain Hall admitted that Mr. McCloy had stated that the report was not to be issued but stated that he was sorry but the report had already been released and there was nothing that could be done. We accepted his statement as true and did not check on it until two weeks had passed without any publicity and then when the report was discussed in the newspapers we checked with the public relations office of the War Department and they advised that the report had just been released and had not been released at the time Captain Hall said it had.

It is also to be noted that parts of the report which, in April 1942 could not be shown to the Department of Justice in connection with the Hirabayashi case in the Supreme Court, were printed in the brief amici curiae of the States of California, Oregon and Washington. In fact the Western Defense Command evaded the statutory requirement that this Department represent the Government in this litigation by preparing the erroneous and intemperate brief which the States filed.

It is entirely clear that the War Department entered into an arrangement with the Western Defense Command to rewrite demonstrably erroneous items in the report by reducing to implication and inference what had been expressed less expertly by the Western Defense Command and then contrived to publish this report without the knowledge of this Department by the use of falsehood and evasion.

For your information I annex copies of (a) my memorandum of April 20, 1943 to the Solicitor General, (b) my

memorandum of January 21, 1944 to the Solicitor General, (c) my memorandum of February 26, 1944 to the Attorney General, and (d) a transcript of Mr. Burling's conversation of January 7, 1944 with Captain Hall which clearly brings out the evasion and falsehood used in connection with the publication of the report.

I also annex copies of memoranda from the FBI and of an exchange of correspondence between the Attorney General and the Chairman of the Federal Communications Commission which establish clearly that the facts are not as General DeWitt states them in his report and also that General DeWitt knew them to be contrary to his report.

RECOMMENDATION: In view of the Attorney General's personal participation in, and final responsibility for, this Department's part in the broad administrative problem of treatment of the Japanese minority, I urge that he be consulted personally on this problem. Much more is involved than the wording of the footnote. The failure to deal adequately now with this Report cited to the Supreme Court either by the Government or other parties, will hopelessly undermine our administrative position in relation to this Japanese problem. We have proved unable to cope with the military authorities on their own ground in these matters. If we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as the military choose to state it. The Attorney General should not be deprived of the present, and perhaps only, chance to set the record straight.

/s/ EDWARD J. ENNIS
EDWARD J. ENNIS

APPENDIX D

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

UNITED STATES CONSTITUTION

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Thirteenth Amendment

(Section 1). Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Habeas Corpus

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. (Article I, Section 9, Clause 2.)

Ex Post Facto and Bills of Attainder

No Bill of Attainder or ex post facto Law shall be passed. (Article I, Section 9, Clause 3).

Privileges and Immunities Clauses

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. (Article IV, Section 2, Clause 1).

Article III

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls, to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. (Section 2 Clause 1).

STATUTES

Tucker Act, 28 U.S.C. § 1491

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .

Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, § 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for

damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

All-Writs Act, 28 U.S.C. § 1651

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Declaratory Judgment Act, 28 U.S.C. § 2201-2202

§ 2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Administrative Procedure Act, 5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action

within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

The 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981

The Attorney General shall have jurisdiction to determine according to law any claim by a person of Japanese ancestry against the United States arising on or after December 7, 1941, when such claim is not compensated for by insurance or otherwise, for damage to or loss of real or personal property (including without limitation as to amount damage to or loss of personal property bailed to or in the custody of the Government or any agent thereof), that is a reasonable and natural consequence of the evacuation or exclusion of such person by the appropriate military commander from a military area in Arizona, California, Oregon, or Washington; or from the Territory of Alaska, or the Territory of Hawaii, under authority of Executive Order Numbered 9066, dated February 19, 1942

(3 CFR, Cum. Supp., 1092), section 67 of the Act of April 30, 1900 [section 532 of Title 48], or Executive Order Numbered 9489, dated October 18, 1944 (3 CFR, 1944 Supp., 45). As used herein "evacuation" shall include voluntary departure from a military area prior to but in anticipation of an order of exclusion therefrom.

EXECUTIVE ORDERS

Executive Order—No. 9066

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretarty of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose

of this order. The designation of military-areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

THE WHITE HOUSE,
February 19, 1942.

Executive Order 9102

ESTABLISHING THE WAR RELOCATION AUTHORITY IN THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING ITS FUNCTIONS AND DUTIES

By virtue of the authority vested in me by the Constitution and statutes of the United States as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security, it is ordered as follows:

1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066[1] of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their Relocation, maintenance, and supervision.

3. In effectuating such program the Director shall have authority to—

(a) Accomplish all necessary evacuation not undertaken by the Secretary of War or appropriate military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.

(b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work in industry, commerce, agriculture, or public projects, prescribe the

[1] 7 F.R. 1407.

terms and conditions of such public employment, and safeguard the public interest in the private employment of such persons.

(c) Secure the cooperation, assistance, or services of any governmental agency.

(d) Prescribe regulations necessary or desirable to promote effective execution of such program, and, as a means of coordinating evacuation and relocation activities, consult with the Secretary of War with respect to regulations issued and measures taken by him.

(e) Make such delegations of authority as he may deem necessary.

(f) Employ necessary personnel, and make such expenditures, including the making of loans and grants and the purchase of real property, as may be necessary, within the limits of such funds as may be made available to the Authority.

4. The Director shall consult with the United States Employment Service and other agencies on employment and other problems incident to activities under this order.

5. The Director shall cooperate with the Alien Property Custodian appointed pursuant to Executive Order No. 9095[2] of March 11, 1942, in formulating policies to govern the custody, management, and disposal by the Alien Property Custodian of property belonging to foreign nationals removed under this order or under Executive Order No. 9066 of February 19, 1942; and may assist all other persons removed under either of such Executive Orders in the management and disposal of other property.

6. Departments and agencies of the United States are directed to cooperate with and assist the Director in his activities hereunder. The Departments of War and Justice,

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[2] 7 F.R. 1971.

under the direction of the Secretary of War and the Attorney General, respectively, shall insofar as consistent with the national interest provide such protective, police and investigational services as the Director shall find necessary in connection with activities under this order.

7. There is established within the War Relocation Authority the War Relocation Work Corps. The Director shall provide, by general regulations, for the enlistment in such Corps, for the duration of the present war, of persons removed under this order or under Executive Order No. 9066 of February 19, 1942, and shall prescribe the terms and conditions of the work to be performed by such Corps, and the compensation to be paid

8. There is established within the War Relocation Authority a Liaison Committee on War Relocation, which shall consist of the Secretary of War, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Labor, the Federal Security Administrator, the Director of Civilian Defense, and the Alien Property Custodian, or their deputies, and such other persons or agencies as the Director may designate. The Liaison Committee shall meet at the call of the Director and shall assist him in his duties.

9. The Director shall keep the President informed with regard to the progress made in carrying out this order, and perform such related duties as the President may from time to time assign to him.

10. In order to avoid duplication of evacuation activities under this order and Executive Order No. 9066 of February 19, 1942, the Director shall not undertake any evacuation activities within military areas designated under said Executive Order No. 9066, without the prior approval of the Secretary of War or the appropriate military commander.

11. This order does not limit the authority granted in Executive Order No. 8972[3] of December 12, 1941; Exec-

utive Order No. 9066 of February 19, 1942; Executive Order No. 9095 of March 11, 1942; Executive Proclamation No. 2525[4] of December 7, 1941; Executive Proclamation No. 2526[5] of December 8, 1941; Executive Proclamation No. 2527[6] of December 8, 1941; Executive Proclamation No. 2533[7] of December 29, 1941; or Executive Proclamation No. 2537[8] of January 14, 1942; nor does it limit the functions of the Federal Bureau of Investigation.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,

March 18, 1942.

Supreme Court, U.S.
FILED
OCT 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-215

In the Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM HOHRI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

1. Whether Takings Clause claims brought by Japanese-Americans and resident Japanese aliens for losses incurred during World War II are barred by the six-year statute of limitations (28 U.S.C. 2401).

2. Whether petitioners' claims for damages against the United States under the Ex Post Facto, Habeas Corpus, and Privileges and Immunities Clauses and the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Thirteenth Amendments are barred by sovereign immunity.

3. Whether a fiduciary duty exists between petitioners and the United States.

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In the Supreme Court of the United States

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WILLIAM HOHRI, ET AL., PETITIONERS

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 847 F.2d 779. The opinion of the district court (Pet. App. 18a-68a) is reported at 586 F. Supp. 769.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1988. The petition for a writ of certiorari was filed on August 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). (The petition also incorrectly cites 28 U.S.C. 1257(3).)

STATEMENT

1. Petitioners are an organization of Japanese-Americans and 19 citizens or resident aliens of Japanese ancestry who were involved in the Japanese evacuation program

during World War II. See generally *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943). On March 16, 1983, petitioners filed this class action[1] against the United States, alleging 22 causes of action arising out of their evacuation and internment, including violations of various provisions of the Constitution (Counts I-XV), a claim for conspiracy to deprive plaintiffs of their civil rights (Count XVI), tort claims (Counts XVII-XX), and allegations of breach of contract and fiduciary duty (Counts XXI-XXII). Jurisdiction was alleged under 28 U.S.C. 1331, 1346(a)(2), and 1346(b) and other provisions.

On motion by the government to dismiss for lack of subject-matter jurisdiction (Fed. R. Civ. P. 12(b)(1)), the district court dismissed the suit in its entirety. Pet. App. 19a-68a. The court held that sovereign immunity barred all of petitioners' claims except for those that could be pursued under either the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, or the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* Pet. App. 39a-44a, 61a-65a.[2] The court held that petitioners' tort claims were barred by petitioners' failure to exhaust their administrative remedies as required by 28 U.S.C. 2675(a), and by the FTCA's two-year statute of limitations, 28 U.S.C. 2401(b). Pet. App.

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[1] Petitioners requested certification of a class consisting of approximately 120,000 Japanese-Americans and resident Japanese aliens, or their descendants. The district court postponed ruling on the certification of the class until resolution of the government's motion to dismiss. Pet. App. 20a n.1.

[2] Petitioners limited their prayer for damages to $10,000 for each nontort cause of action for each class member (Pet. App. 128a), thereby bringing their Tucker Act claims within 28 U.S.C. 1346(a)(2), the "Little Tucker Act," which provides for concurrent jurisdiction in the United States Claims Court and in the district courts. See 28 U.S.C. 1491.

62a-63a. The court dismissed the breach-of-contract claim on the basis of the statute of limitations (Pet. App. 58a-60a), and the breach-of-fiduciary-duty claim on the ground that no fiduciary duty existed (Pet. App. 60a-61a).

With respect to petitioners' taking claims, the district court held that the claims stated a cause of action against the United States under the Tucker Act but were barred by the six-year statute of limitations, 28 U.S.C. 2401(a). Pet. App. 47a-58a. Petitioners had argued before the district court that the statute of limitations was tolled because the government had fraudulently concealed information that was essential to their Takings Clause claims. Petitioners did not allege that they had not known of their property losses, but rather that the government had concealed memoranda suggesting the absence of military necessity for the evacuation of Japanese-Americans on the West Coast, and that any suit brought under the Takings Clause after the war would have "foundered upon the government's defense that evacuation and internment were required by military necessity" (Pet. App. 49a). Petitioners argued that the concealed evidence was first revealed in a report released by the Commission on Wartime Relocation and Internment of Civilians (CWRIC), *Personal Justice Denied,* and that, accordingly, the statute of limitations did not begin to run until that report was released in 1983.

Specifically, petitioners alleged that documents written during the war called into question the military necessity for the evacuation. The first of these was a memorandum (86-510 J.A. 226-237)[3] prepared in January 1942 by Lt. Commander Kenneth Ringle of the Los Angeles Branch of the Office of Naval Intelligence, in which he offered his opinion that the "Japanese Problem" had been magnified

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[3] "86-510 J.A." refers to the joint appendix filed in this Court in *United States* v. *Hohri,* No. 86-510 (June 1, 1987).

out of proportion, that 75% of Japanese-Americans were loyal and a majority of resident Japanese aliens "at least passively loyal to the United States," and that the "potentially dangerous element" (*id.* at 227-229) could be individually identified. Petitioners also referred to two memoranda written in 1944 by FCC Chairman James Fly and FBI Director J. Edgar Hoover (see *id.* at 238-243 (Fly); Pet. App. 33a (summarizing Hoover)), which questioned certain findings concerning shore-to-ship communications stated in a report of General John L. DeWitt, Commanding General of the Western Defense Command, to have occurred along the West Coast.[4]

The district court found that "the events surrounding the evacuation and internment have been subjected to intense scrutiny over the years and have produced a lengthy literature" and that the various memoranda submitted by

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[4] Petitioners also pointed to documents that they claimed were disclosed for the first time in the CWRIC report. The district court discussed those documents and found that they were either irrelevant to petitioners' claims or corroborative of information already available. Pet. App. 53a-57a. Three of the documents were wartime Justice Department memoranda in which Edward Ennis, Director of the Department's Alien Enemy Control Unit, and attorney John Burling urged that the evidence questioning military necessity—notably, the substance of the Ringle report, which had been published in the October 1942 issue of *Harpers Magazine*—should be called to the Supreme Court's attention in the government's briefs in *Korematsu* and *Hirabayashi*. Pet. App. 131a-136a (Ennis); Pet. App. 137a-138a (Burling). The district court noted that the documents to which Ennis and Burling referred "became public and were available to diligent plaintiffs from the late 1940's onward," that "there has long been sufficient circumstantial evidence" that the Justice Department had the Ringle, Fly, and Hoover memoranda when it filed its brief in *Korematsu*, and that the concealment, whether intentional or not, "[was] not a basis for tolling a statute of limitations beyond the time the information concealed by that conduct was published" (Pet. App. 56a-57a).

petitioners had been published "at least as early as 1949" in Martin Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949). Pet. App. 51a, 52a & n.26. The district court concluded that, because "[t]hese publications lay out almost all of the facts alleged by [petitioners], along with many others," petitioners could not "claim that the facts underlying their suit were discovered by the Commission on Wartime Relocation and Internment of Civilians. * * * [A] suit could have been filed long ago" (Pet. App. 52a-53a).

2. Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit. A divided panel of that court held that it had appellate jurisdiction and then affirmed the dismissal of all of petitioners' claims except the Takings Clause claims. *Hohri* v. *United States,* 782 F.2d 227 (1986). As to the Takings Clause claims, however, the court held that the statute of limitations had been tolled until 1980, when, in the court's view, the government first confessed "*legal* error" (782 F.2d at 253 n.67).

Both the United States (No. 86-510) and the plaintiffs (No. 86-298) filed petitions for certiorari seeking review of the judgment of the court of appeals. This Court granted the government's petition and unanimously reversed the D.C. Circuit on jurisdictional grounds, ruling that the Federal Circuit had exclusive jurisdiction over the appeal. *United States* v. *Hohri,* No. 86-510 (June 1, 1987). The Court remanded the case with directions to transfer it to the Federal Circuit. The Court also granted the plaintiffs' petition and remanded the entire case "[b]ecause our resolution in No. 86-510 requires us to vacate the entire judgment of the Court of Appeals" (slip op. 3 n.2).

3. On remand, a divided panel of the Federal Circuit, in a per curiam opinion, affirmed the judgment in its entirety. The court held, "[a]fter a meticulous review" of

the district court's opinion, that "[e]ach of the numerous issues raised to this court [was] fully addressed in the opinion of Judge Oberdorfer"; the court was "unpersuaded of any error"; and there was "no need to restate or elaborate on the district court's careful and scholarly analysis" (Pet. App. 4a). Accordingly, the court "affirm[ed] for the reasons stated in the district court opinion" (*ibid.*).

Judge Baldwin dissented. He "agree[d] with much of what the trial judge sa[id]," but did not agree that petitioners' taking claims were barred by the statute of limitations (Pet. App. 5a). Instead, he would have held that *Korematsu* and *Hirabayashi* "*effectively* closed [the courts] * * * to evacuated and interned Japanese-Americans to challenge the validity of the exclusion orders" (Pet. App. 9a (emphasis in original)). While he acknowledged that "[petitioners] may have been on notice to inquire," and admitted that "[s]trict application of [the statute of limitations] * * * would yield the result reached by the trial court and majority," Judge Baldwin concluded that "it did not matter that [petitioners] knew of the existence of their injury and the identity of the defendant," because "any complaint filed by [petitioners] would have resulted in dismissal" (Pet. App. 10a, 12a (footnote omitted)). According to Judge Baldwin, the statute of limitations was tolled until passage in 1980 of the congressional Act creating the Commission on Wartime Relocation and Internment of Civilians, which constituted "the first intimation by any branch of the government that the Court's deference to the military was *legally* erroneous" (Pet. App. 14a (emphasis in original)).

ARGUMENT

Petitioners' claims are without merit. The decision below does not conflict with any decision of this Court or

another court of appeals. There is, accordingly, no warrant for further review.

1. We do not dispute that, as Congress has recently declared, "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry" (Act of Aug. 10, 1988, Pub. L. No. 100-383, § 2(a), 102 Stat. 903), and that, as President Ford proclaimed, the wartime measures out of which the case arose were "a setback to fundamental American principles" and involved "national mistakes" (Proclamation No. 4417, 41 Fed. Reg. 7741 (1976)). See also Pet. 13 n.10. Like all who have suffered wrongs, however, petitioners were obliged to pursue their claims diligently. The limitations period applicable to a suit against the United States " 'constitutes a condition on the waiver of sovereign immunity' " and, as such, "define[s] the extent of the court's jurisdiction" over a claim. *United States* v. *Mottaz,* 476 U.S. 834, 841 (1986) (quoting *Block* v. *North Dakota,* 461 U.S. 273, 287 (1983)); see also *United States* v. *Kubrick,* 444 U.S. 111, 117-118 (1979). Statutes of limitations "must be strictly observed" and may not be interpreted "in a manner that would 'extend the waiver [of sovereign immunity] beyond that which Congress intended' " (*Block* v. *North Dakota,* 461 U.S. at 287 (quoting *Kubrick,* 444 U.S. at 118)); see also *Soriano* v. *United States,* 352 U.S. 270, 276 (1957).

Petitioners assert (Pet. 13-17) that the statute of limitations on their taking claims (Count III) was tolled because the government misled this Court in *Korematsu* and *Hirabayashi* as to the lack of military necessity for the exclusion of Japanese-Americans. Petitioners further claim that they did not know of the government's "fraud" and, therefore, could not have reasonably brought suit until the 1980s, when certain documents were discovered and then released by the Commission on Wartime Relocation and Internment of Civilians. Pet. 17-22.

Petitioners are wrong for multiple reasons. Although the government had in its possession materials concerning the evacuation that it did not present to this Court while litigating *Hirabayashi* and *Korematsu,* those materials did not contradict the government's factual assertions before this Court. The government did not mislead this Court. Furthermore, nothing in this Court's decisions in *Hirabayashi* and *Korematsu* purported to address the "momentous questions not contained within the framework of the pleadings or the evidence" (*Korematsu,* 323 U.S. at 222) or otherwise suggested that a Takings Clause claim would have been futile. The losses of which petitioners now complain were completely known at the time. Nothing excuses petitioners' failure to bring such an action within six years of the alleged takings.

a. Petitioners argue that "not a single act of espionage or sabotage by Americans of Japanese ancestry in the United States was ever shown" (Pet. 11). The statement is true but devoid of the significance attributed to it by petitioners. As the CWRIC found, "[t]he Justice Department, defending the exclusion before the Supreme Court, made no claim that there was identifiable subversive activity" (*Personal Justice Denied* 50). We have previously explained in some detail (No. 86-510, Brief for the United States at 31-37; Reply Brief for the United States at 6-13) that the government did not mislead this Court while defending the evacuation in *Korematsu* and *Hirabayashi.*

In justifying the evacuation before this Court, the United States made a claim of "military necessity." In support of that claim, the United States did *not* argue that there was specific conduct by Japanese-Americans alleged to be indicative of past or planned subversive activity. Rather, the government looked to ancestral, cultural, and ethnic considerations, and then drew an inference about the likelihood of subversive activity. Brief for the United

States at 18-32, *Hirabayashi*; Brief for the United States at 11-12, 21-23, 26, 54-55 & n.28, *Korematsu*; see also J. ten-Broek, E. Barnhart & F. Matson, *Prejudice, War and the Constitution* 215-216, 265-266 (1954); Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L.J. 489, 505-507 (1945). The government argued extensively that the Japanese people as a whole shared certain cultural, ethnic, and religious characteristics that made it "entirely possible that an unknown number of Japanese may lack to some extent a feeling of loyalty toward the United States." From this, the government concluded that, "[a]lthough it may be assumed that the majority of the Japanese residents on the West Coast were loyal to the United States, the very presence of the entire group presented grave danger because that group comprehended an unknown number of unidentified persons who constituted a serious threat," and that in order to deal effectively with the "unknown number of persons who could not readily be singled out," it was "necessary not only to deal with the entire group, but to deal with it at once" (Brief for the United States at 21, 34, 35, *Hirabayashi* (footnote omitted)). Whatever may have been wrong with those arguments was plain on the face of the arguments for the Court to see and evaluate; nothing in the government's arguments depended in the least on false factual assertions.

At the time of *Korematsu*, there was in public circulation a document—General DeWitt's *Final Report*—on which the government *could have* relied for certain questionable factual assertions, but the government did not rely on the *Final Report* in that regard. That document purported to find evidence of subversive activity by Japanese-Americans in certain unidentified shore-to-ship signaling on the West Coast, but the government had in its possession the Fly and Hoover memoranda, which called into question the assertions in the *Final Report* about signal-

ing. Therefore it would have been questionable to cite the *Final Report* on those points without disclosing the contradictory information. See Pet. App. 31a-38a. The United States, however, expressly disclaimed any reliance on the *Final Report* insofar as it went beyond the inferential arguments specifically set forth in the government's brief. See Brief for the United States at 11 n.2, *Korematsu*. This explicit dis-incorporation of the more colorful allegations of the *Final Report* was clearly understood at the time by the other litigants, the Court, and other observers. See, *e.g.*, Brief of the American Civil Liberties Union as Amicus Curiae at 21, *Korematsu* (describing the footnote as a "singular repudiation of General DeWitt's testimony on the military necessities"); see also *Personal Justice Denied* 88 ("in its brief to the Supreme Court the Justice Department was careful not to rely on DeWitt's *Final Report* as a factual basis for the military decision it had to defend") (footnote omitted); Rostow, *supra*, 54 Yale L.J. at 520.[5]

Although Department of Justice attorneys Ennis and Burling had urged a footnote that more specifically indicated why the government limited its reliance on the *Final Report* (Pet. App. 139a-143a), the footnote as written in the brief was not misleading.[6] Consistent with the govern-

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[5] The colloquy from the *Korematsu* oral argument on which petitioners rely (Pet. 15) confirms, rather than undercuts, the proposition that the government carefully avoided reliance on the questionable factual assertions in the *Final Report*. Solicitor General Fahy responded to Chief Justice Stone's question by stating, "We stand on the proposition that there is sufficient [information], *from what is known as a matter of public knowledge, and which is not controverted,* to support the [military] judgment." Transcript of Oral Argument, *Korematsu*, at 10 (emphasis added).

[6] We note, in this regard, that the district court (whose opinion has now been adopted as that of the court of appeals) erred in suggesting

ment's disclaimer, the opinion of the Court in *Korematsu* cited the *Final Report* once (see 323 U.S. at 219 n.2), and there only for the correct proposition that "investigations made subsequent to the exclusion" showed that some evacuees "refused to swear unqualified allegiance to the United States" and that others "requested repatriation to Japan" (*id.* at 219 (footnote omitted)). Indeed, the only substantive discussion of the *Final Report* in *Korematsu* is found in the dissent by Justice Murphy, who extensively used the *Final Report* to argue that the evacuation was supported only by racist motives. See 323 U.S. at 235-239 (Murphy, J., dissenting).

This Court agreed in large measure with the government's arguments based on racial, ancestral, and cultural characteristics. The Court "stated in detail facts and circumstances * * * which support[ed] the judgment of the war-waging branches of the Government" that the evacuation was justified. The Court found that those facts and circumstances "afforded a rational basis for the decision which [was] made" (*Hirabayashi,* 320 U.S. at 101-102). According to the Court, the relevant circumstances were "facts of public notoriety" (*id.* at 102), including the events leading to the evacuation order (*id.* at 85-89), congressional findings (*id.* at 89-92), and the "social, economic and political conditions" that "in the particular war setting * * * set [Japanese-Americans] apart from others" (*id.* at 96, 101).[7] "[T]hose facts, and the inferences which could

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that the Ennis and Burling memoranda "fully justify the condemnation of the wartime Department of Justice voiced by the Commission [on Wartime Relocation and Internment of Civilians] and the plaintiffs" (Pet. App. 55a). The report of the Commission, *Personal Justice Denied,* is sharply critical of the evacuation itself but contains not a word of criticism of the Department of Justice for the manner in which it litigated the wartime cases before this Court.

[7] In particular, the Court considered the "social, economic and political conditions" as "some of the many considerations which those

be rationally drawn from them," the Court concluded, provided "adequate support" for the government's actions (*id.* at 103, 105). Similarly, in *Korematsu,* the Court cited evidence that tended to "confirm[ ]" (323 U.S. at 219) "the assumptions upon which [it] rested [its] conclusions in the *Hirabayashi* case" (*id.* at 218). In short, the Court understood full well that the government's arguments were based on racial and social characteristics of Japanese-Americans rather than on claims of identifiable subversive activity, and the Court likewise based its judgment on the former and not the latter. The existence of a disavowed document containing questionable claims of identifiable subversive activity lends no support to petitioners' contention that the government defrauded this Court.[8]

b. Even assuming, arguendo, that the government committed improprieties that were somehow responsible for the results reached in *Hirabayashi* and *Korematsu,*

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charged with the responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage" (*Hirabayashi,* 320 U.S. at 96, 98-99; see also *id.* at 90-91, 96-99, 101; *Korematsu,* 323 U.S. at 218-219).

[8] Thus, petitioners' assertion (Pet. 4) that the Ennis and Burling memoranda "show[ed] that responsible government officials at the time *actually knew* there was no factual justification to the claim of 'military necessity' and *knew* the exclusion and detention program was solely the product of racial animus" is not correct. Those documents show that the government knew that it had no basis for claiming that identifiable subversive activity, as opposed to general characteristics of Japanese-Americans, justified a claim of "military necessity." The government's statements to this Court were consistent with that knowledge. Only by falsely equating the government's claim of "military necessity" with a claim of identifiable subversive activity—a meaning that neither the government nor this Court assigned to that phrase at the time—can petitioners argue that the government acted duplicitously before this Court.

petitioners cannot rely on either decision to shield their inaction because neither decision foreclosed a suit for a taking of property. There is thus no basis for petitioners' claim that a timely civil suit based on the Takings Clause "would have foundered upon the government's defense that evacuation and internment were required by military necessity" (Pet. App. 49a). To the contrary, in both decisions the Court emphasized the narrowness of its ruling—which was limited, in *Hirabayashi,* to sustaining a "curfew order" (320 U.S. at 105), and in *Korematsu,* to upholding "temporary exclusion" of Japanese-Americans from a restricted area "as of the time [that the] order was made and when the petitioner violated it" (323 U.S. at 219).[9]

It is unlikely that the United States could have successfully asserted a defense of military necessity to petitioners' taking claims. Any argument that the takings were required by military necessity is severely undercut by the steps, though in many instances unsuccessful, that were taken to avoid destruction or appropriation of property. See No. 86-510, Brief for the United States at 39-40. In any event, the defense of "military necessity" is a narrowly tailored exception to the general rule that "a taking of private property * * * when the emergency of the public service in time of war * * * is too urgent to admit of delay

[9] In both cases the Court reserved the question whether "confinement" (*Hirabayashi,* 320 U.S. at 105), or "detention" (*Korematsu,* 323 U.S. at 222), was justified. In *Korematsu* the Court wrote, "we are dealing specifically with nothing but an exclusion order" and described as "momentous" and "serious" the questions it did not reach concerning the legality of assembly or relocation orders (*id.* at 222-223). Accordingly, the Court stated that it would "deal[ ] specifically with nothing but an exclusion order" (*id.* at 223). "It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied * * * and we have its terms before us" (*id.* at 222).

* * * creates an obligation on the part of the government to reimburse" (*United States* v. *Russell*, 80 U.S. (13 Wall.) 623, 629 (1871)). It has been limited almost exclusively to the "extraordinary situation" (*United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 182 (1958) (Harlan, J., dissenting)) where property is destroyed "by the operations of armies in the field" (*United States* v. *Pacific Railroad*, 120 U.S. 227, 239 (1887)), in order "to prevent the enemy from using it" (*United States* v. *Caltex, Inc.*, 344 U.S. 149, 153 (1952)). The "military necessity" precedents under the Takings Clause are inapposite to petitioners' claims. Although lower courts were obliged to follow the holding of *Korematsu*—that the *evacuation* was constitutional—nothing would have required them to capitulate to (non-existent) claims that military necessity justified the taking of property. And this Court, of course, had no obligation even to adhere to *Korematsu* if a timely attempt had been made to challenge it in the context of a Takings Clause claim.[10]

c. Even assuming, arguendo, that the statute of limitations was tolled on petitioners' takings claims, the courts below properly held that the tolling ended "long ago" (Pet.

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[10] Moreover, we note that the property losses of which petitioners complain—those resulting from their exclusion and internment—were certainly known at the time. See Japanese-American Evacuation Claims Act of 1948, ch. 814, 62 Stat. 1231, codified as amended at 50 U.S.C. App. (& Supp. III) 1981-1987; *Personal Justice Denied* 118 (noting that more than 26,000 claims for aggregate payment of $148,000,000 were filed under the Act). Petitioners obviously do not, and cannot, claim that the government concealed their claims. Rather, what petitioners claim was concealed was evidence that would have undermined a *defense* that petitioners assumed the government would assert against those claims. Yet at least one prominent legal figure had suggested in 1945 that Japanese-Americans should seek "generous financial indemnity" for the "heavy property losses [suffered] as a consequence of their evacuation." Rostow, *supra*, 54 Yale L.J. at 533.

App. 55a, 57a). When a statute of limitations is tolled, the tolling does not last until whatever moment the plaintiff decides to bring suit. Rather, the tolling suspends the statute of limitations as against a plaintiff who is "blameless[ly] ignoran[t]" (*Urie* v. *Thompson*, 337 U.S. 163, 170 (1949)) of his claim until he is reasonably chargeable with notice of those facts that are required to plead a right of action. "Once [a] plaintiff is on inquiry that it has a potential claim, the statute can start to run" (*Japanese War Notes Claimants Association* v. *United States*, 373 F.2d 356, 359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967)), and the potential plaintiff must decide, within the period of the statute of limitations, "whether to sue or not." *United States* v. *Kubrick*, 444 U.S. 111, 124 (1979).

The evidence on which petitioners rely was available long before petitioners brought suit in 1983. If the statute of limitations was ever tolled—and, for the reasons explained above, it was not—the tolling ended with publication in the late 1940s of the Ringle, Fly, and Hoover documents that, as the district court found, were cited and discussed in M. Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation* (1949). See Pet. App. 51a-52a. Grodzins was followed in the 1950s, 1960s, and 1970s by several other books that discussed the three memoranda. See Pet. App. 52a n.26 (listing publications).[11]

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[11] Nor can petitioners take comfort in the discovery in the 1980s of the Ennis and Burling memoranda. As the district court found, those memoranda reflect no more than "that some Justice Department officials believed that DeWitt's military necessity rationale was questionable" (Pet. App. 54a). At best, the memoranda present one side of a vigorous debate within the Department of Justice and between the Department of Justice and the War Department over the evacuation policy. Moreover, the memoranda only evidence *opinions* held by some attorneys on the inferences to be drawn from the Fly, Hoover, and Ringle memoranda; they do not contain additional *facts* that, if

Nor is there merit in petitioners' argument (Pet. 17-22) that there is a conflict between the decision below and the Ninth Circuit's decision in *Hirabayashi* v. *United States,* 828 F.2d 591 (1987). In *Hirabayashi,* the Ninth Circuit held that, in light of the discovery of the first draft of the *Final Report,* Gordon Hirabayashi had filed a timely petition for a writ of error coram nobis and was entitled to have his conviction vacated. The ruling of the court below, that petitioners' taking claims were barred by the statute of limitations, in no way conflicts with the Ninth Circuit's ruling that Hirabayashi's petition for coram nobis was not barred by laches. See Pet. App. 55a-56a & n.28.[12] See also *Yasui* v. *United States,* 772 F.2d 1496 (9th Cir. 1985). The filing of a timely suit under the Takings Clause is plainly not analogous to the filing of a timely petition for a writ of coram nobis. The former is a civil action and is governed

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known, would have put petitioners on notice of their claims. Furthermore, as the district court found, "it is the Ringle, Fly, and Hoover documents, not the Ennis and Burling memoranda, which contain the direct evidence requisite to challenging the finding of military necessity. * * * The publication in the late 1940s of the previously concealed Ringle, Fly, and Hoover documents, not the publication in the 1980s of the Ennis and Burling memoranda, provided the basis on which plaintiffs could have filed a complaint challenging the military necessity finding and marked the beginning of the running of the statute of limitations" (Pet. App. 55a-56a).

[12] The district court distinguished this case from the coram nobis proceedings in *Korematsu* v. *United States,* 584 F. Supp. 1406 (N.D. Cal. 1984), on the ground that "this case involves the government's sovereign immunity, and thus requires a searching investigation of timeliness" (Pet. App. 55a-56a n.28). Although "the 'specific evidence' of [what the district court viewed as] governmental misconduct has only recently been revealed, circumstantial evidence has long been available" (*ibid.*). Moreover, "evidence of the government's misconduct was not requisite to the filing of [petitioners'] claims here; other evidence rebutting the government's claim of military necessity was available" (*ibid.*).

by a statute of limitations (28 U.S.C. 2401), whereas the latter is a post-conviction proceeding in equity subject to the doctrine of laches. See *United States* v. *Morgan*, 346 U.S. 502, 505 n.4, 511-513 (1954); *United States* v. *Darnell*, 716 F.2d 479, 480-481 (7th Cir.), cert. denied, 465 U.S. 1083 (1983).[13]

2. With respect to their remaining constitutional claims (Counts I-II, IV-XV), petitioners' principal argument is that this case is "*sui generis*" (Pet. 27) and that "a rigid application of sovereign immunity" would be "inappropriate" (Pet. 9, 22). Petitioners argue that, since the Tucker Act (28 U.S.C. 1491) waives sovereign immunity for claims "arising under the Constitution," they "should not need to show any further consent by Congress as a precondition" to their various constitutional claims (Pet. 23) and that the Court "need not be constrained to find an express statutory waiver of sovereign immunity" (Pet. 26). Petitioners' argument is completely without merit. As the Court has recently emphasized, "[a]s sovereign, the United States, in the absence of its consent, is immune from suit." *Library of Congress* v. *Shaw*, 478 U.S. 310, 315 (1986).

[13] There is, to be sure, a vast difference between our view of the historical record and that adopted by the Ninth Circuit in *Hirabayashi*. In particular, we cannot see how the government does anything wrong when it edits out of an official document statements that reflect the opinions of the document's drafter but do not reflect the opinions or policy of his superiors within the government, nor do we see how minor editorial changes to the *Final Report*—on which the government did not rely before this Court—could possibly have influenced this Court's judgment. Compare No. 86-510, Reply Brief for the United States at 9-13 & nn.14-15, with *Hirabayashi*, 828 F.2d at 599-604. There is, however, no need for this Court to grant certiorari in order to correct the historical record. There is no conflict between *Hirabayashi* and the decision below because of the entirely different procedures under which the two cases arose, and, in any event, there is little or no reasonable likelihood that the issue will arise again in either context. Thus, the usual reason for resolving conflicts among the circuits would be absent in this case even if there were a square conflict.

This Court has repeatedly affirmed that the Tucker Act "does not create any substantive right enforceable against the United States for money damages" (*United States* v. *Testan,* 424 U.S. 392, 398 (1976)). See also *United States* v. *Mitchell,* 463 U.S. 206, 216 (1983) (*Mitchell II*); *United States* v. *Mitchell,* 445 U.S. 535, 538 (1980) (*Mitchell I*). Rather, it is a limited waiver of sovereign immunity for substantive rights "found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department' " (*Mitchell II,* 463 U.S. at 216 (quoting 28 U.S.C. 1491)). See also *Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 734 (1982). The "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (*Testan,* 424 U.S. at 400, quoting *Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)).

Petitioners do not and cannot allege that any constitutional provision under which they brought a claim—except the Takings Clause—can fairly be said to mandate the payment of damages by the United States.[14] Indeed, "[t]he

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[14] Petitioners also contend that they "should not be barred from FTCA remedies for failure to file administrative claims pursuant to 28 U.S.C. § 2675(a)" (Pet. 24 n.13). That suggestion is not properly before this Court, as petitioners did not include it in their questions presented. Nor does it have any merit. Section 2675(a) makes plain that an action "shall not be instituted upon a claim against the United States for money damages * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." The courts have held that prior presentation is a "jurisdictional prerequisite to suit" (*Bruce* v. *United States,* 621 F.2d 914, 918 (8th Cir. 1980)) that "cannot be waived" (*Erxleben* v. *United States,* 668 F.2d 268, 271 (7th Cir. 1981)). See also *Odin* v. *United States,* 656 F.2d 798, 802 (D.C. Cir. 1981); *Schuler* v. *United States,* 628 F.2d 199, 201 (D.C. Cir. 1980) (en

courts have uniformly held that jurisdiction under the 'founded upon the constitution' grant of the Tucker Act is limited to claims under the 'takings clause' of the Fifth Amendment" (*Clark* v. *Library of Congress,* 750 F.2d 89, 103 n.31 (D.C. Cir. 1984)). Consequently, damage claims asserted against the United States under other provisions of the Constitution have consistently been rejected. See, *e.g., Clemente* v. *United States,* 766 F.2d 1358, 1363 (9th Cir. 1985) (claim brought under Fifth Amendment Due Process Clause), cert. denied, 474 U.S. 1101 (1986); *Radin* v. *United States,* 699 F.2d 681, 685 n.8 (4th Cir. 1983) (claim brought under Fifth Amendment Due Process Clause); *Jaffee* v. *United States,* 592 F.2d 712, 717-718 (3d Cir.) (claims brought under First, Fourth, Fifth, Eighth, and Ninth Amendments), cert. denied, 441 U.S. 961 (1979); *Duarte* v. *United States,* 532 F.2d 850, 851-852 (2d Cir. 1976) (claim brought under Fifth Amendment Due Process Clause); see also *Jaffee* v. *United States,* 663 F.2d 1226, 1230-1231 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); *Jalil* v. *Campbell,* 590 F.2d 1120, 1123 (D.C. Cir. 1978) (per curiam).[15]

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banc). Moreover, the district court correctly held (Pet. App. 62a-63a) that, in any event, petitioners' FTCA claims are barred by the FTCA's two-year statute of limitations (28 U.S.C. 2401(b)).

[15] Petitioners also claim, however, that constitutional rights become "vested property rights" (Pet. 25-26) for which they may demand compensation under the Takings Clause. Even if petitioners' novel vesting theory had merit (which it plainly does not), any claim to such a cause of action would still have to be brought under the Takings Clause and would have to have been filed within six years of the taking. Petitioners further argue that "[i]n the highly unusual facts of this case" the constitutional rights themselves may mandate compensation, and that, as a last resort, the judiciary has "inherent power" to protect constitutional rights and to create "all necessary remedies" (Pet. 23, 27). There is no precedent for petitioners' request, and, to the extent petitioners urge the Court to employ its equitable powers,

3. The district court correctly held that there is no evidence that the United States created a fiduciary relationship between the United States and the Japanese-Americans. Petitioners' reference (Pet. 28) to *Mitchell II* is unavailing. In *Mitchell II,* the Court held that there was a fiduciary relationship arising from the government's "elaborate" and "pervasive" statutory control over the resources of the Quinault Tribe (463 U.S. at 225 & n.29). The Court found that the statute gave the government "full responsibility to manage Indian resources and land for the benefit of the Indians" (*id.* at 224).[16] The Court's holding was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people" (*id.* at 225).

There is no analogous relationship here. Certainly, the United States tried to assist the evacuees to provide for their property and wind up their affairs, and the government provided for the basic needs of those Japanese-Americans interned in the interior, but it stretches credulity to say that there was "a general trust relationship" between the United States and the internees for their benefit. But even assuming, arguendo, that a fiduciary relationship

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"it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.' " *INS* v. *Pangilinan,* No. 86-1992 (June 17, 1988), slip op. 8 (quoting *Hedges* v. *Dixon County,* 150 U.S. 182, 192 (1893)).

[16] By contrast, in *Mitchell I,* the Court held that the Indian General Allotment Act, 25 U.S.C. (& Supp. IV) 331 *et seq.*, did not create a fiduciary duty despite the Act's language providing that the government was to "hold the land . . . in trust for the sole use and benefit" of the Quinault (445 U.S. at 541 (quoting 25 U.S.C. 348)). The Court found that the Act created only "a limited trust relationship" because it did not "unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands" (*id.* at 542).

was created in the 1940s, the fiduciary responsibilities of the United States would have ended long ago—by petitioners' calculation, in 1946 (Pet. App. 117a)—and the claims are barred by the statute of limitations. See *Mann* v. *United States,* 399 F.2d 672, 673 (9th Cir. 1968) (FTCA action filed by uneducated, minor Indian barred by statute of limitations; "[t]he fact that [plaintiff] is an Indian cannot * * * make a difference here"); see also *Smith* v. *United States,* 588 F.2d 1209, 1211 (8th Cir. 1978) (minority does not toll statute of limitations); *Casias* v. *United States,* 532 F.2d 1339, 1342 (10th Cir. 1976) (insanity does not toll statute of limitations under FTCA).

4. Finally, petitioners contend that this Court is the "last bastion for protecting the rights of minorities against abuses of government power," and that, under the "highly unusual facts of this case," the Court "should not leave the question of constitutional redress to the political process" (Pet. 13, 23). To the contrary, Congress is plainly the proper source of redress for "*sui generis*" cases. See, *e.g., United States* v. *Sioux Nation of Indians,* 448 U.S. 371 (1980).

Petitioners have not been, and are not now, without legislative redress in this case. In 1948 Congress, recognizing that "[t]he evacuation orders gave the persons affected desperately little time in which to settle their affairs," that the "safeguards that were designed to prevent undue loss * * * were never entirely successful," and that "the losses have been heavy" (H.R. Rep. 496, 82d Cong., 1st Sess. 1, 2 (1951) (letter from J.A. Krug, Secretary of the Interior, to Joseph W. Martin, Jr., Speaker of the House)), enacted the Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. App. (& Supp. III) 1981-1987, to redress property losses. Any petitioners or putative class members who received payments under that Act are barred from recovering here "with respect to all

claims arising out of the same subject matter" (50 U.S.C. App. 1984(d)). See Pet. App. 16a-17a (Baldwin, J., dissenting); 782 F.2d at 255-256.

More important, on August 10, 1988, the President signed into law Pub. L. No. 100-383, 102 Stat. 903. The Act provides that among the purposes for the legislation are to "acknowledge the fundamental injustice of the evacuation, relocation, and internment," to "apologize on behalf of the people of the United States," and to "make restitution to those individuals of Japanese ancestry who were interned." Pub. L. No. 100-383, § 1(1), (2), and (4), 102 Stat. 903. The Act adopts as a "Statement of the Congress" the finding that "a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians," and that these acts "were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." Pub. L. No. 100-383, § 2(a), 102 Stat. 903-904; see H.R. Conf. Rep. 100-785, 100th Cong., 2d Sess. (1988). Finally, the Act makes restitution of $20,000 to Japanese-Americans and resident alien Japanese interned during World War II,[17] an award

[17] Although Congress has offered petitioners the reparations they sought through this suit, the Act does not necessarily moot this case. The Act would moot the claims of those petitioners who elect to accept the reparations offered by Congress. The acceptance of payment is "in full satisfaction of all claims against the United States arising out of the [evacuation and internment]" (§ 105(a)(5), 102 Stat. 906-907). However, petitioners could only accept any reparations in this case by waiving their right to reparations under the Act: "[n]o payment may be made * * * to any individual who * * * accepts payment pursuant to an award of a final judgment or a settlement on a claim against the United States" (§ 105(a)(6), 102 Stat. 907). At least one putative class member has publicly declared her intention to decline the reparations because "I want the Supreme Court to look at this" (Wash. Post, Aug. 4, 1988, at C1, C14).

double that which could be recovered in this suit under the Takings Clause.[18]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[18] Petitioners waived damages in excess of $10,000 for any claim in order to bring suit in district court. See note 2, *supra*; Pet. App. 128a.

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